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DEPARTMENT OF JUSTICE

28 CFR Part 26

Docket No. 1540; AG Order No. 3399-2013

RIN 1121- AA77

Certification Process for State Capital Counsel System

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Final rule.

SUMMARY: Chapter 154 of title 28, United States Code, provides special procedures for Federal habeas corpus review of cases brought by indigent prisoners in State custody who are subject to a capital sentence. These special procedures are available to States that the Attorney General has certified as having established mechanisms for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by such prisoners, and as providing standards of competency for the appointment of counsel in these proceedings. This rule sets forth the regulations for the certification procedure.

DATES: *Effective Date:* This rule is effective [PLEASE INSERT DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION:

Chapter 154 of title 28, United States Code, makes special procedures applicable in Federal habeas corpus review of State capital judgments if the Attorney General has certified “that [the] State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265” and “counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.” 28 U.S.C. 2261(b). Section 2265(a)(1) provides that, if requested by an appropriate State official, the Attorney General must determine “whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State [capital] postconviction proceedings brought by indigent prisoners” and “whether the State provides standards of competency for the appointment of counsel in [such] proceedings.”

Chapter 154 was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104-132, section 107, 110 Stat. 1214, 1221–26 (1996), and was amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109-177, section 507, 120 Stat. 192, 250–51 (2006). Before the 2006 amendments, the regional Federal courts in their review of State capital cases determined States’ eligibility for the chapter 154 habeas corpus review procedures. The 2006 amendments re-assigned responsibility for chapter 154 certifications to the Attorney General of the United States, subject to de novo review by the Court of Appeals for the District of Columbia Circuit, and added a provision stating that there are no requirements for certification or for application of chapter 154 other than those expressly stated in the chapter, 28 U.S.C. 2265(a)(3). The effects of the 2006 amendments are explained in an opinion of the Department’s Office of Legal Counsel and, where relevant to a specific provision in the rule, elsewhere in this preamble. *See The Attorney General’s Authority*

in Certifying Whether a State Has Satisfied the Requirements for Appointment of Competent Counsel for Purposes of Capital Conviction Review Proceedings, 33 Op. O.L.C. ___, at *12 (Dec. 16, 2009) (“OLC Opinion”), available at <http://www.justice.gov/olc/opinions.htm>.

Section 2265(b) directs the Attorney General to promulgate regulations to implement the certification procedure under chapter 154. The Attorney General accordingly published a proposed rule in the *Federal Register* on June 6, 2007, to add a new subpart entitled “Certification Process for State Capital Counsel Systems” to 28 CFR part 26. 72 FR 31217. The comment period ended on August 6, 2007. The Department published a notice on August 9, 2007, reopening the comment period, 72 FR 44816, and the reopened comment period ended on September 24, 2007. A final rule establishing the chapter 154 certification procedure was published on December 11, 2008, 73 FR 75327 (the “2008 regulations”), with an effective date of January 12, 2009.

In January 2009, the United States District Court for the Northern District of California enjoined the Department “from putting into effect the rule . . . without first providing an additional comment period of at least thirty days and publishing a response to any comments received during such period.” *Habeas Corpus Resource Ctr. v. U.S. Dep’t of Justice*, No. 08-2649, 2009 WL 185423, at *10 (N.D. Cal. Jan. 20, 2009) (preliminary injunction); *Habeas Corpus Resource Ctr. v. U.S. Dep’t of Justice*, No. 08-2649, slip op. at 1 (Jan. 8, 2009) (temporary restraining order). On February 5, 2009, the Department solicited further public comment, with the comment period closing on April 6, 2009. 74 FR 6131.

As the Department reviewed the submitted comments, it considered further the statutory requirements governing the regulatory implementation of the chapter 154 certification procedures. The Attorney General determined that chapter 154 gave him greater discretion in

making certification determinations than the 2008 regulations would have allowed. Therefore, the Department published a notice in the *Federal Register* on May 25, 2010, proposing to remove the 2008 regulations pending the completion of a new rulemaking process, during which the Department would further consider what procedures were appropriate. 75 FR 29217. The comment period closed on June 24, 2010. On November 23, 2010, the Department published a final rule removing the 2008 regulations. 75 FR 71353.

The Department published a new proposed rule on March 3, 2011. 76 FR 11705. The comment period closed on June 1, 2011. The Department published a supplemental notice of proposed rulemaking on February 13, 2012, which identified a number of possible changes the Department was considering based on comments received in response to the publication of the proposed rule. 77 FR 7559. The comment period closed on March 14, 2012.

Summary of Comments

About 60 comments were received on the proposed rule, including both comments received on the initial notice of proposed rulemaking and comments received on the supplemental notice of proposed rulemaking.

Some commenters urged the Department to publish, in effect, a third notice of proposed rulemaking so as to disclose the exact text of the final rule—particularly the language regarding the effect of compliance with benchmarks on certification—before its publication. However, the Department published the full text of the proposed rule in the original notice of proposed rulemaking. 76 FR 11705. It also published a supplemental notice of proposed rulemaking to provide a further opportunity for public input on changes to the rule under consideration following initial comment. 77 FR 7559. The text of this final rule is the same as that published in the original notice of proposed rulemaking, except for five changes to that text that were

precisely described in the supplemental notice, further clarifying amendments (affecting §§ 26.20, 26. 21, 26.22(b), (c), and (d), and 26.23(c)), and minor technical changes. All of the changes made to the text directly pertain to subjects and issues identified as under consideration by the terms of the original notice and supplemental notice and are responsive to the public comments received on those notices. The extensive comments received in response to the two publications confirm that interested members of the public were able to comment intelligently on the issues affecting the formulation of the final rule and in fact did so.

In the ensuing summary, comments that concern the general approach of the rule or that affect a number of provisions in the rule are discussed initially, followed by discussion of comments that pertain more specifically to particular provisions in the rule.

General Comments

The Basic Approach of the Rule

Two commenters argued that the Attorney General lacks authority to articulate substantive standards for chapter 154 certification, contending instead that chapter 154 limits the Attorney General to performing ministerial tasks when exercising his or her certification responsibilities. These comments are not well-founded. Chapter 154 is reasonably construed to allow the Attorney General to define within reasonable bounds the chapter's requirements for certification, and to evaluate whether a State's mechanism is adequate for purposes of ensuring that it will result in the appointment of competent counsel. The reasons for this conclusion are summarized in the OLC Opinion and elsewhere in this preamble.

Many commenters agreed that the Attorney General may appropriately specify and apply a substantive Federal standard that State mechanisms must meet to satisfy chapter 154's requirements for certification, and this rule specifies that standard, within the limits of the

statutory scheme it implements: (i) *Appointment*—Chapter 154 requires the Attorney General to certify “whether the State has established a mechanism for the appointment . . . of . . . counsel” in State capital collateral proceedings. This rule provides further specification regarding the statutory appointment procedures and discusses the express statutory provisions that require such appointments to occur in a reasonably timely fashion. (ii) *Competent Counsel*—Chapter 154 provides that the Attorney General must determine whether the State has established a mechanism for the appointment of “competent counsel” in State capital collateral proceedings, and “whether the State provides standards of competency for the appointment of counsel” in such proceedings. This rule provides two “benchmark” competency standards that are presumptively sufficient to warrant certification while still leaving States some leeway to adopt other standards so long as they reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases. (iii) *Compensation and payment of reasonable litigation expenses*—Chapter 154 additionally requires the Attorney General to determine whether the State has established a mechanism for the “compensation” and “payment of reasonable litigation expenses” of competent counsel in State capital collateral proceedings. This rule provides four benchmark compensation standards that are presumptively adequate while again leaving States some significant discretion to formulate alternative compensation schemes, if reasonably designed to ensure the availability and timely appointment of competent counsel. And as to all of these matters, this rule provides that the Attorney General will consider a State’s submission requesting certification and any input from interested parties received through a public comment procedure before determining whether certification is warranted.

Several commenters, however, argued that the certification standards and procedures promulgated in this rule (and described in the prior notice and supplemental notice of proposed

rulemaking) do not go far enough in dictating the standards States must meet, or in providing for sufficient review and oversight by the Attorney General of State compliance with mechanisms for which certification is sought. For the reasons discussed generally below, and elsewhere in this preamble in the context of specific provisions of the rule, the Department has not adopted the changes proposed by these commenters.

Some of these commenters urged that the rule incorporate counsel competency provisions that would have the effect of eliminating or largely displacing State discretion to develop, within appropriate bounds, mechanisms for ensuring that competent counsel are appointed. One commenter, for instance, proposed that the rule should prescribe uniform national competency standards that must be adopted by any and all States seeking certification. Other commenters contended that the rule should incorporate measures as to prior experience in capital and postconviction capital proceedings, specialized training, demonstrated competence according to performance standards, and removal of attorneys who fail to provide effective representation—and find deficient, without exception, any State system that does not incorporate *all* of these features. The Department did not accept these comments, believing that they risk conflict with the statutory scheme, which leaves room for States to formulate their own standards so long as they reasonably assure the availability and appointment of competent counsel. *See* OLC Opinion at *12–13; *see also* 135 Cong. Rec. 24696 (1989) (report of the Judicial Conference’s Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (“the Powell Committee report”) from which many of the relevant features of Chapter 154 derive, explaining that giving States “wide latitude to establish a mechanism that complies with [the statutory requirements]” is “more consistent with the federal-state balance”).

Raising another issue, several comments proposed that the rule require a showing of State compliance with its own established mechanism as a condition of certification. As envisioned by these comments, the Attorney General, when presented with a request for certification, would review a State's record of appointments in individual cases to verify that the appointments were made in conformity with the State's established mechanism. These comments were not adopted because the statutory scheme does not call for such case-specific oversight by the Attorney General of State compliance with a mechanism it has established.

Chapter 154 in its current formulation states two preconditions for the chapter's applicability in a particular case: (1) as provided in section 2261(b)(1), "the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265"; and (2) as provided in section 2261(b)(2), "counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent." Of these two functions, only the general certification function is assigned to "the Attorney General of the United States." The case-specific function of ascertaining whether counsel was appointed pursuant to the certified mechanism is reserved to Federal habeas courts, which can address individual irregularities and decide whether the Federal habeas corpus review procedures of chapter 154 will apply in particular cases. If the commenters were correct in asserting that the Attorney General should withhold certification unless he or she finds that the State has complied with its established mechanism in every case, there would have been little need for Congress to have included section 2261(b)(2). *Cf. Ashmus v. Woodford*, 202 F.3d 1160, 1168 & n.13 (9th Cir. 2000) (chapter 154 designed to avoid case-by-case analysis of counsel's competence by requiring binding appointment standards). Moreover, if a State establishes a new mechanism for

appointment of competent counsel (in response to this rule and its articulation of benchmark standards) and requests at the outset that the Attorney General determine its adequacy, chapter 154 should not be read to foreclose certification simply because the Attorney General would not yet have a basis to examine the State's compliance with the newly established system.

Though the Department rejects the suggestion that the Attorney General's certification determination should depend on whether a State complies with its own mechanism in isolated cases, the question of whether a State has "established" a mechanism is a conceptually distinct matter that the statutory framework *does* charge the Attorney General with determining, *see* 28 U.S.C. 2265(a)(1)(A)–(B). The requirement of having "established" a mechanism consistent with chapter 154 presupposes that the State has adopted and implemented standards consistent with the chapter's requirements concerning counsel appointment, competency, compensation, and expenses. Thus, the rule allows for the possibility that the Attorney General will need to address situations in which there has been a wholesale failure to implement one or more material elements of a mechanism described in a State's certification submission, such as when a State's submission relying on § 26.22(b)(1)(ii) in the rule points to a statute that authorizes a State agency to create and fund a statewide attorney monitoring program, but the agency never actually expends any funds, or expends funds to provide for monitoring of attorneys in only a few of its cities. Addressing any such situations would require careful consideration of the specific features of a mechanism presented for certification, and is therefore best left to individual certification decisions. Other than in these situations, should they arise, questions of compliance by a State with the standards of its capital counsel mechanism will be a matter for the Federal habeas courts.

Finally, a few of the comments could be read to suggest that chapter 154 requires the Attorney General to certify a State mechanism only if he or she examines and is satisfied by the actual performance of postconviction counsel following appointment. On such an understanding, an assessment by the Attorney General of the performance of attorneys in State habeas proceedings (e.g., what investigation was done or not done, or what arguments were made or not made in a habeas petition) would inform a decision as to whether the State's mechanism adequately provides for appointment of competent postconviction counsel and, accordingly, whether chapter 154 certification is warranted. To the extent that the comments urged such an interpretation, it was rejected in formulating the rule.

The actual requirements under chapter 154 relating to counsel competency are establishment by a State of "a mechanism for the appointment . . . of competent counsel" in State capital collateral proceedings, and provision by the State of "standards of competency for the appointment of counsel" in such proceedings. Neither of these provisions suggests that the Attorney General is required to inquire into the facts of how counsel performed following appointment in all or some subset of cases. Rather, both frame their requirements regarding counsel competency as matters relating to appointment, and are naturally understood as contemplating an inquiry into whether a State has put in place adequate qualification standards that counsel must meet to be eligible for appointment. This understanding is supported by the Powell Committee report. The report explained that Federal review would examine whether a State's mechanism for appointing capital postconviction counsel comports with the statutory requirements "as opposed to the competency of particular counsel." 135 Cong. Rec. 24696 (1989). It further explained that, in contrast to the focus on "the performance of a capital

defendant's trial and appellate counsel," "[t]he effectiveness of state and federal postconviction counsel is a matter that can and must be dealt with in the appointment process." *Id.*

The Role of the Attorney General

Some commenters asserted that the Attorney General has an inherent conflict of interest that should disqualify him from making certification determinations under chapter 154. These commenters claimed that the Attorney General's prosecutorial functions and responsibilities would render him unable to objectively evaluate State capital counsel systems. The remediation proposed by these commenters included the suggestion that the Attorney General delegate his functions under chapter 154 to some other official or division within the Department of Justice that the commenters believed would be free of the supposed conflict of interest. Commenters also proposed that the Attorney General only exercise his certification responsibilities on the basis of very specific, inflexible criteria that would leave no room for judgment or discretion by the Attorney General in evaluating a given State system under chapter 154.

As an initial matter, the Attorney General cannot refrain from carrying out the functions assigned to him by chapter 154: the law requires him to discharge those functions. Congress assigned the certification function to the Attorney General after having heard arguments concerning a purported conflict of interest similar to those now advanced by the commenters. *See* 28 U.S.C. 2265(a)(1); *Habeas Reform: The Streamlined Procedures Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 26–27 (2005); *see also id.* at 54 (written statement of Professor Eric M. Freedman on behalf of the American Bar Association) ("The Attorney General is the nation's chief *prosecutor* and thus is hardly an appropriate officer to decide whether a state has kept its part of the 'opt in' bargain."). Moreover, the enactment of chapter 154 is not the first time that Congress has assigned to the Attorney General the task of evaluating State efforts to

provide attorney representation to petitioners convicted of a capital crime. For example, the Innocence Protection Act of 2004, Public Law 108-405, Title IV, Subtitle B, 118 Stat. 2260, 2286–92 (2004) (“IPA”), contemplates the administration by the Attorney General of a program to improve the quality of legal representation provided to indigent petitioners in State capital cases, including the making of grants to States willing to implement federally prescribed capital counsel standards, continuing oversight of the capital defense systems of States that accept funding, and negotiation or direction by the Attorney General of corrective actions needed to secure compliance by those States with the federally prescribed capital counsel requirements. *See* 42 U.S.C. 14163, 14163c–14163d; 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake) (noting as precedent for chapter 154 responsibilities of the Attorney General that “[j]ust last year . . . Congress assigned the Attorney General to evaluate State . . . capital counsel systems” under the IPA).

More fundamentally, there is no sound basis for the claim that the Attorney General has a conflict of interest that would preclude him from fairly carrying out the functions assigned to him by Congress. The criteria the Attorney General will apply in deciding whether a State has satisfied the chapter 154 requirements do not control what will be deemed constitutionally effective or ineffective assistance of counsel in the criminal cases for which the Attorney General is responsible. Addressing questions concerning what constitutes constitutionally effective assistance calls for an assessment of an attorney’s performance in a given case, and as already noted, the Attorney General will not make such independent assessments in the context of making certification decisions under chapter 154, which call instead for an evaluation of general competency standards put in place by a State mechanism. Hence, there is no basis to conclude that the determinations that the Attorney General must make when presented with a request for

certification of a State mechanism would conflict with the conduct of the Attorney General's prosecutorial functions.

Moreover, the functions performed by the Attorney General in his criminal law enforcement and prosecutorial oversight capacities are only part of the broader, diverse range of duties he regularly performs. The Department, under the Attorney General's supervision, administers and carries out programs for the improvement of indigent criminal defense systems, both generally and with respect to capital cases in particular. *See, e.g.*, Bureau of Justice Assistance, U.S. Dep't of Justice, *Answering Gideon's Call: Improving Indigent Defense Delivery Systems, FY 2012 Competitive Grant Announcement* (April 4, 2012); Bureau of Justice Assistance, U.S. Dep't of Justice, *Capital Case Litigation Initiative, FY 2011 Competitive Grant Announcement* (Jan. 11, 2011); Bureau of Justice Assistance, U.S. Dep't of Justice, *Capital Case Litigation Initiative*, http://www.bja.gov/ProgramDetails.aspx?Program_ID=52 (last visited July 23, 2013) (further information on capital case litigation initiative); U.S. Dep't of Justice, *The Access to Justice Initiative*, <http://www.justice.gov/atj> (last visited July 23, 2013) (home page for the Department's Access to Justice Initiative, which seeks to "increase access to counsel and legal assistance," including by advancing "new statutory, policy, and practice changes that support development of quality indigent defense"). The Attorney General leads and convenes the Federal Interagency Reentry Council, a government-wide effort to improve employment, housing, treatment, and educational opportunities for individuals who were previously incarcerated. The Department of Justice also handles much of the Federal government's civil litigation under the Attorney General's authority, in some cases serving as or representing the plaintiff and in others serving as or representing the defendant. In addition, the Attorney General oversees the Department's Community Relations Service, which provides violence prevention

and conflict resolution services to State and local governments, private organizations, and community groups. These examples demonstrate that the Attorney General is accustomed to appropriately balancing varied and occasionally competing interests in the exercise of his duties. Thus, even if carrying out the certification function assigned to him by law did affect the Department's criminal enforcement efforts (though it does not), the commenters have made no persuasive showing that the Attorney General would be unable to fairly evaluate a State's certification request.

In addition, discharge of the required chapter 154 functions by the Attorney General is consistent with Rule 1.7(a)(2) of the American Bar Association ("ABA") Model Rules of Professional Conduct (and comparable rules adopted by most State supreme courts), which provides in relevant part that "a lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." The Attorney General has no responsibilities to a client that would materially limit the discharge of the chapter 154 certification function, because the Attorney General's only relevant client is the United States, which through Congress has expressly directed the discharge of that function by law. There is also no reason to believe that the Attorney General has any responsibility to a "former client" or "third person," or any "personal interest," that would materially impair his representation of the United States in the discharge of that function. The Attorney General has a professional obligation to abide by the "client's decisions concerning the objectives of representation," ABA Model Rule 1.2(a), making it difficult to conceive how the Attorney General could have such a disqualifying conflict in representing the United States when

it is the United States that has mandated through its laws that the Attorney General carry out the chapter 154 certification function.

Against this background, there is no force to the claim of some commenters that the Attorney General has an inherent conflict of interest in carrying out his legal duties under chapter 154—which potentially affects defense and judicial review functions in criminal cases for which the Attorney General is not responsible—because the Attorney General oversees the conduct of prosecutions in Federal criminal cases, among other duties. Modification of the rule to incorporate the remedial measures proposed by these commenters is accordingly not necessary because the underlying assumption of a conflict of interest is not well-founded. Indeed, the specific remedy suggested by many of these commenters, that the Attorney General address the purported conflict of interest by delegating the certification function to the Department’s Inspector General, would itself pose problems. Among others, the task of certifying State capital counsel mechanisms falls outside the current duties, responsibilities, and expertise of the Inspector General and his staff, which focus on fraud, waste, and abuse in the Department of Justice, *see* 5 U.S.C. App. 3 sections 4, 8E.

Relationship to Prior Judicial Interpretation

Some commenters criticized the rule as inconsistent with the judicial construction of chapter 154. However, prior judicial interpretation of chapter 154, much of which remains generally informative, supports many features of this rule, as this preamble documents. To the extent the rule approaches certain matters differently from some past judicial decisions, there are reasons for the differences.

One reason judicial decisions could not consistently be followed on some matters in this rule is that the decisions were not in accord with each other on these matters. For example, as

discussed below in connection with § 26.22(b) of the rule, some district court decisions regarded prior capital litigation experience as necessary to qualify for appointment under chapter 154, but appellate precedent and other authority permit a more flexible approach that would understand capital litigation experience to be relevant and often helpful, but not indispensable.

Textual changes that Congress has made in chapter 154 are another reason for differences from prior judicial decisions under chapter 154. For example, as explained below in the analysis statement accompanying § 26.21 in this rule, chapter 154 originally had separate provisions for State systems bifurcating direct and collateral review (28 U.S.C. 2261 (2000) (amended 2006)) and State “unitary review” systems in which collateral claims may be raised in the course of direct review (28 U.S.C. 2265 (2000) (amended 2006)). Both sets of provisions included language specifying the form that State standards establishing the required capital counsel mechanism must take. The general provisions in former section 2261(b) required that a State establish the mechanism “by statute, rule of its court of last resort, or by another agency authorized by State law.” The provisions in section 2265(a) for unitary review procedures required that a State establish the mechanism “by rule of its court of last resort or by statute.” Both sections said that “[t]he rule of court or statute must provide standards of competency for the appointment of . . . counsel.”

In *Ashmus v. Calderon*, the court concluded that the State unitary review procedure under review in that case did not satisfy chapter 154, in part because the State’s qualification standards for appointment of capital counsel were not set out in a “rule of court” in the relevant sense. 123 F.3d 1199, 1207–08 (9th Cir. 1997). This particular ground for denying chapter 154 certification no longer exists under the current formulation of chapter 154. The amendments to chapter 154 enacted in 2006 replaced the separate provisions for bifurcated and unitary review procedures

with uniform requirements that apply to all State systems and eliminated the former language specifying that the relevant standards were to be provided by rule of court or statute.

This rule accordingly does not include a requirement that relevant State standards must be adopted by any particular means, notwithstanding the judicial application of such a requirement when the statutory language was different. While States still must establish capital counsel mechanisms that satisfy the chapter 154 requirements to be certified, there is no requirement that they do so in any particular form, such as only through standards set out in rules of court. So long as there has been an authoritative adoption or articulation by a State of binding standards, and those standards are not otherwise negated or overridden by State policy, the standards are “established” for the purposes of chapter 154.

Other differences reflect the change in responsibility for chapter 154 certification under the 2006 amendments. Prior to those amendments, requests to invoke the chapter 154 procedures were presented to Federal habeas courts in the context of particular State capital cases they were reviewing. Courts in that posture considered both whether the State had established a mechanism satisfying chapter 154, and if so, whether counsel for the petitioner in the particular case before them had been provided in full compliance with that mechanism. Hence, if counsel had not been appointed on collateral review in a particular case, or if the attorney provided did not satisfy the State’s competency standards for such appointments, for example, the courts could find chapter 154 inapplicable on that basis, regardless of whether the State had established a capital counsel mechanism that otherwise satisfied the requirements of chapter 154. *See, e.g., Tucker v. Catoe*, 221 F.3d 600, 604–05 (4th Cir. 2000) (“We accordingly conclude that a state must not only enact a ‘mechanism’ and standards for postconviction review counsel, but those

mechanisms and standards must in fact be complied with before the state may invoke the time limitations of 28 U.S.C. 2263.”).

The result in such a case is not necessarily different under the current formulation of chapter 154, but the route to that result is not the same. In entertaining a State’s request for chapter 154 certification, the Attorney General has no individual case before him and is not responsible for determining whether a State has complied with its mechanism in any particular case. Rather, as discussed above, 28 U.S.C. 2261(b)(1) assigns to the Attorney General the general certification function under chapter 154, which makes him responsible for determining whether a mechanism has been established by the State and whether the State provides standards of competency. If the State mechanism is certified, appointment of counsel pursuant to the certified mechanism (absent waiver or retention of counsel or a finding of non-indigence) continues to be a further condition for the applicability of chapter 154. But whether that has occurred in any individual case is, under 28 U.S.C. 2261(b)(2), a matter within the province of the Federal habeas court to which the case is presented, not the Attorney General.

Section 26.20—Purpose

A comment on this section as drafted in the proposed rule objected that it did not mention the condition for chapter 154’s applicability appearing in 28 U.S.C. 2261(b)(2). While the section 2261(b)(2) requirement was noted in the preamble to the proposed rule, *see* 76 FR at 11706, 11710–11, the objection is well-taken. The final text of § 26.20 reflects explicitly that the applicability of the Federal habeas corpus review procedures of 28 U.S.C. 2262, 2263, 2264, and 2266 in a capital case depends on both certification of the State’s postconviction capital counsel mechanism, as provided in 28 U.S.C. 2261(b)(1), and appointment of counsel pursuant to the

certified mechanism (absent waiver or retention of counsel or a finding of non-indigency), as provided in 28 U.S.C. 2261(b)(2).

Section 26.21—Definitions

Appointment

Many comments raised the concern that the proposed rule did not address the timing of counsel appointment. The concern reflected the general importance of the timely availability of counsel in the context of a complex and difficult type of litigation and specific issues arising from chapter 154’s special time limit for Federal habeas filing. *Compare* 28 U.S.C. 2263 (general 180-day time limit under chapter 154) *with* 28 U.S.C. 2244(d) (one-year time limit otherwise applicable).

The Department believes that the concern reflected in these comments is well-founded. Chapter 154 involves a *quid pro quo* arrangement under which appointment of counsel for indigents is extended to postconviction proceedings in capital cases, and in return, subsequent Federal habeas review is carried out with generally more limited time frames and scope. *See, e.g.,* H.R. Rep. No. 104-23, at 10 (1995) (noting the chapter’s “quid pro quo arrangement under which states are accorded stronger finality rules on Federal habeas review in return for strengthening the right to counsel for indigent capital defendants”). The Powell Committee report, from which this essential feature of chapter 154 derives, explained that “[c]apital cases should be subject to one complete and fair course of collateral review in the state and federal system . . . with the assistance of competent counsel for the defendant” and that “[t]he belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness.” 135 Cong. Rec. 24695 (1989).

The quid pro quo arrangement of chapter 154 requires provision of counsel to capital petitioners in State postconviction proceedings in return for Federal habeas review carried out with generally more limited time frames and scope. Against this background, not every conceivable provision for making postconviction counsel available, however belatedly—e.g., only after the deadline for pursuing State postconviction proceedings had passed; or only after the expiration of section 2263’s time limit for Federal habeas filing; or only after such delay that the time available for preparing for and pursuing either State or Federal postconviction review had been seriously eroded—can logically be regarded as providing for appointment of counsel within the meaning of chapter 154. Consistent with such considerations, judicial decisions under chapter 154 that addressed the matter concluded that the State mechanism must provide for timely appointment of counsel. *See, e.g., Brown v. Puckett*, No. 3:01CV197-D, 2003 WL 21018627, at *3 (N.D. Miss. Mar. 12, 2003) (“The timely appointment of counsel at the conclusion of direct review is an essential requirement in the opt-in structure. Because the abbreviated 180-day statute of limitations begins to run immediately upon the conclusion of direct review, time is of the essence. Without a requirement for the timely appointment of counsel, the system is not in compliance.”); *Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1187 (N.D. Cal. 1998) (“The quid pro quo would be hollow indeed if compliance by the state was satisfied by merely offering and promising to appoint competent counsel with no element of timeliness.”); *Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996) (“[T]he Court holds that any offer of counsel pursuant to Section 2261 must be a *meaningful offer*. That is, counsel must be immediately appointed after a capital defendant accepts the state’s offer of postconviction counsel.”), *rev’d on other grounds*, 147 F.3d 1333 (11th Cir. 1998).

The supplemental notice of proposed rulemaking accordingly proposed specifying more clearly that an adequately functioning mechanism, as described in chapter 154, will necessarily incorporate a policy for the timely appointment of competent counsel. *See* 77 FR at 7560–61. Section 26.21 of the final rule does so by adding a definition of appointment that clarifies that it entails “provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.” *See* American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, at 127 (rev. ed. Feb. 2003), *available at* <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/deathpenaltyguidelines2003.authcheckdam.pdf> (“ABA Guidelines”) (increasingly intertwined nature of State and Federal habeas proceedings means that “although the AEDPA deals strictly with cases being litigated in federal court, its statute of limitations provision creates a de facto statute of limitations for filing a collateral review petition in state court”).

Nevertheless, two comments responding to the supplemental notice objected to this change from the proposed rule as inconsistent with the current version of chapter 154, which provides that “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” 28 U.S.C. 2265(a)(3). However, the definition of appointment in § 26.21 does not add to the express requirements for certification. Rather, as explained above, it reflects a contextual understanding of chapter 154’s express requirement of a mechanism for appointment of competent postconviction capital counsel, *see* 28 U.S.C. 2265(a)(1), to encompass some standard for affording postconviction representation in a manner that is reasonably timely in light of the relevant postconviction review time limitations and the

time required for developing and presenting claims. *See* OLC Opinion at *8 (“In reasonably construing an ambiguous term in a statute that he is charged with administering, the Attorney General would not be adding to the requirements for certification . . . [but] merely would be implementing an express statutory provision . . . just as agency officials regularly do in other contexts” under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984).).

Other features of chapter 154 provide additional textual support for the final rule’s definition of “appointment” and confirm it is consistent with the express statutory scheme, including section 2265(a)(3). Section 2262(a), for instance, provides for an automatic stay of execution, by application to a Federal habeas court, upon entry of an order appointing counsel. If chapter 154 permitted a State to delay appointment of counsel, an execution that is scheduled for a date shortly after the denial of a prisoner’s direct appeal could occur before the prisoner receives the State postconviction counsel and the automatic stay that chapter 154 promises. Likewise, chapter 154 expressly contemplates that States will establish, and the Attorney General will review, standards expected to produce *competent* representation by appointed counsel. 28 U.S.C. 2265(a)(1)(A), (C). Judgments concerning what competency standards are needed may well vary based on expectations about the amount of time an attorney will have to perform requisite tasks. The need for counsel to be appointed in a reasonably timely fashion, especially in light of the relevant statutory deadlines for seeking habeas relief, sets such expectations and enables the judgments that the statutory framework requires.

The two concerned commenters also cite legislative history evidence, specifically two floor statements criticizing the Ninth Circuit’s decision in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2001), in support of their objection to the articulation in this rule of chapter 154’s

requirement that appointments be made in a reasonably timely fashion. *See, e.g.*, 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl, the sponsor of the amendment, including that it “forbids creation of additional requirements not expressly stated in the chapter, as was done in the *Spears* case”); 151 Cong. Rec. E2639 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake). However, the legislators’ criticism of the *Spears* decision does not support the commenters’ objection to the rule’s articulation of chapter 154’s timeliness requirement. *Spears* addressed an issue concerning the timing of appointment of capital collateral counsel in two contexts, finding first that a rule adopted by the Arizona Supreme Court did adequately provide for timely appointment of counsel, but then declining to apply the chapter 154 Federal habeas review procedures in that particular case on the ground that counsel was not appointed within the time frame called for by the mechanism. *Compare Spears*, 283 F.3d at 1017 (“We conclude that the Arizona statutory mechanism for the appointment of postconviction counsel [requiring appointment within 15 days of notice that the conviction had become final] . . . offered counsel to all indigent capital defendants . . . in a timely fashion.”), *with id.* at 1018–19 (holding that chapter 154 did not apply “in Petitioner’s case” because his attorney was appointed over a year after the mechanism’s deadline). The object of the dissatisfaction expressed in the floor statements upon which the two commenters rely was neither the positive determination in *Spears* regarding the need for a timing component in a State’s mechanism nor the adequacy of Arizona’s timing provision for purposes of chapter 154, but rather the denial to the State of the benefits of chapter 154 in that individual case. *See* 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl); 151 Cong. Rec. E2639–40 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake).

The Attorney General’s current role under chapter 154 parallels that of the *Spears* court in making the first of these two determinations—whether the mechanism in force in the State adequately provides for the reasonably timely appointment of counsel. Nothing in the present rule would bar the Attorney General from approving, as the *Spears* court did, a State mechanism that provides for timely provision of counsel. Whether and in what circumstances a delay in appointment of counsel would affect chapter 154’s applicability in an *individual* case may be considered by Federal habeas courts in the exercise of their function under 28 U.S.C. 2261(b)(2), and is not a question that the statute assigns to the Attorney General.

In any event, courts ordinarily give floor statements, even statements made by the sponsor of a bill or amendment, relatively limited weight in analyzing Congress’s intent. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984). This is appropriate in the case of the legislation that added section 2265(a)(3) to chapter 154 because the commenters principally rely on views expressed by a Senator that were not included in the bill’s conference report, *compare* H.R. Rep. No. 109-333, at 109–10 (2005) (Conf. Rep.) (making no reference to the timing of appointments, and identifying not *Spears*, but a different case that involved a different issue as being “overruled” by the bill’s provisions), *with* 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl). *See Ctr. for Sci. in the Pub. Interest v. Regan*, 802 F.2d 518, 523 (D.C. Cir. 1986) (noting that “the contemporaneous remarks of a single legislator, even a sponsor, are not controlling in legislative history analysis; rather, those remarks must be considered along with other statements and published committee reports”). Thus, even if the commenters’ reading of the floor statements’ criticism of *Spears* were correct, the statements should not be treated as controlling or as indicative of congressional intent contrary to the rule’s clarification of a requirement for reasonably timely appointment of counsel.

With respect to a separate but related issue, one commenter suggested that § 26.21’s definition of “appointment” to encompass a timeliness element is unnecessary because courts may alternatively address problems under chapter 154 resulting from delay in providing postconviction counsel by adjusting the operation of the relevant time limits for filing. The commenter cited *Rhines v. Weber*, 544 U.S. 269 (2005), and *In re Morgan*, 50 Cal. 4th 932, 237 P.3d 993 (2010), for support.

As an initial matter, it is unclear to what extent these cited cases apply to the issue at hand. *Rhines*, for example, involved stay-and-abey procedures that may not be available to petitioners under chapter 154, *see* 28 U.S.C. 2264(b), and *Morgan* focused on the viability of *pro se* “shell” State habeas petitions—a practice that, even if it were firmly established and accepted by both State and Federal courts, raises significant concerns in the chapter 154 context. As a practical matter, for example, not every State petitioner will be in a position to understand the necessity for filing such a petition and able to file a petition successfully. Moreover, chapter 154 contemplates that in exchange for substantial benefits on Federal habeas review, States will provide not the opportunity for petitioners to file *pro se* State habeas petitions, but the opportunity for petitioners to file *counseled* State habeas petitions. *See Mills v. Anderson*, 961 F. Supp. 198, 201 n.4 (S.D. Ohio 1997) (questioning whether State mechanism that provides for appointment of counsel only after filing of *pro se* petition is inadequate under chapter 154). Thus, the relevance of the procedures discussed in *Rhines* and *Morgan* is uncertain. Even if available in this context, they would at most affect what might be thought necessary to reasonably assure the timely appointment of counsel. The possible existence of such procedures would not undermine the conclusion that the “appointment” required under chapter 154 must be made in a reasonably timely manner, as reflected in the definition in § 26.21.

Some commenters approved of the rule's specification of the requirement for timely appointment but stated that it should provide a more definite period of time (e.g., a specific number of days or weeks) within which State mechanisms must appoint counsel. The Department believes, however, that States must have significant latitude in designing mechanisms for ensuring that competent counsel are appointed, *see* OLC Opinion at *12–13, and this rule therefore does not define timeliness in terms of a specific number of days or weeks within which counsel is to be provided. Instead, a State need only demonstrate that it has established a mechanism for affording counsel in a manner that is reasonably timely, in light of the time limits for seeking State and Federal collateral review and the effort involved in the investigation, research, and filing of effective habeas petitions, which protect a petitioner's right to meaningful habeas review.

Additionally, some commenters urged that the rule should require that appointment of postconviction capital counsel be timely in relation to the petitioner's conviction, not just in relation to the time limits for seeking State and Federal postconviction review and the time required for preparing postconviction claims. The rationale offered for this proposal was that direct review of the judgment in capital cases, occurring between the end of the trial proceedings and the commencement of postconviction proceedings, may take a long time, and that evidence and records that would be useful to the defense in postconviction proceedings may be lost in the meantime. While the Department does not question the value of efforts to avoid spoliation of evidence, consideration can be given only within the statutory framework; to the extent these commenters contemplated requiring that postconviction counsel be appointed even before the conclusion of direct review, such a mandate would appear to go beyond chapter 154's

requirements for appointment of counsel “in State postconviction proceedings.” 28 U.S.C. 2265(a)(1); *see id.* 2261(b)(1).

Appropriate State Official

Section 26.21 of the rule, in part, defines an “appropriate State official” who may request chapter 154 certification under 28 U.S.C. 2265(a)(1) to mean the State attorney general or the State chief executive if the State attorney general does not have responsibility for Federal habeas corpus litigation. Some commenters objected to the rule’s designation of the State attorney general as the appropriate official to request chapter 154 certification on grounds of conflict of interest, lack of relevant knowledge, interference with State discretion, and exceeding statutory authority.

The comments received provided no persuasive reasons for changing the definition of “appropriate State official” in § 26.21. First, the objection that the State attorney general’s litigation interests may lead him to make unsound judgments whether his State has satisfied chapter 154’s requirements conflates the role of applicant and that of decision-maker. Under this rule, the State attorney general is authorized to request certification, but it will be the U.S. Attorney General who makes a wholly independent determination of whether certification is warranted. In making this determination, the U.S. Attorney General will consider any supporting or contrary information or views that any interested entity may choose to submit through the public comment procedure set out in § 26.23 of the rule, in addition to whatever the State attorney general may offer on the question.

Second, designation of the State attorney general as the “appropriate State official” is consistent with both the original language of chapter 154 and the 2006 amendments. Prior to the 2006 amendments, Federal habeas courts determined whether chapter 154’s requirements were

satisfied, so State attorneys general responsible for Federal habeas corpus litigation in capital cases were able to seek determinations that the State capital counsel mechanism satisfied the chapter 154 requirements as part of their litigation functions. The court, not the State attorney general, was the decision-maker on that question, and the court's decision was informed by hearing the views of others with opposed interests, in addition to those of the State attorney general. The transfer of the chapter 154 certification function from the Federal courts to the U.S. Attorney General does not materially change this framework. The State attorney general is authorized to seek certification; the U.S. Attorney General, not the State attorney general, is the decision-maker; and the U.S. Attorney General will consider any views proffered by others as discussed above.

Third, the Attorney General's decisions regarding chapter 154 certification are subject to de novo review by the D.C. Circuit Court of Appeals, as provided in 28 U.S.C. 2265(c), and seeking such review would commonly be within the litigation authority of the State attorney general, regardless of which official had sought the initial determination from the U.S. Attorney General. It would be odd to deem the State attorney general an inappropriate official to seek chapter 154 certification from the U.S. Attorney General in the first instance, where the statutes interpose no obstacle to State attorneys general seeking the same determination from the D.C. Circuit at a later stage.

Fourth, the objection regarding lack of relevant knowledge by the State attorney general is also unpersuasive. This objection in the comments appears to be premised largely on the belief that States seeking certification will normally submit with their request a set of comprehensive data that demonstrate the operation of the State's collateral review system in capital cases, including such matters as the amount of awards to defense counsel for litigation

expenses in particular cases, of which the State attorney general might in some cases be unaware. The proposition that the Attorney General must conduct such a case-by-case review under chapter 154 is not well-founded, for reasons discussed earlier in this preamble. Additionally, the Department finds it significant that none of the commenters identified a person in a State likely to have better knowledge than the State attorney general or chief executive concerning matters relevant to certification. Thus, even if it is accepted that a State attorney general may not have perfectly complete information in every instance, there is no basis to believe that there is an alternative official or individual better suited to the task. Moreover, if at times there is information relevant to the U.S. Attorney General's determination that the State attorney general may not have, any interested person is free to provide such information through the public comment procedure for certification requests set out in § 26.23(b)–(c) in this rule.

Finally, the objection in the present comments regarding potential conflict with State law reflects a misunderstanding of the rule, which does not preempt State law. If State law were to prohibit a State attorney general from requesting chapter 154 certification, then the State attorney general would be barred by State law from making such a request. That has no bearing on the formulation of § 26.21, which only defines the class of State officials whose request for chapter 154 certification triggers the requirement under 28 U.S.C. 2265(a)(1) that the U.S. Attorney General make a chapter 154 certification decision. Moreover, any concern about potential conflict with State law is purely speculative. No State submitted comments on this rule stating that it has prohibited, wishes to prohibit, or may prohibit the State attorney general from requesting chapter 154 certification on behalf of the State.

Section 26.22(a)—Statutory Requirements Concerning Appointments

Section 26.22(a) tracks chapter 154’s provisions concerning the procedures for appointment of counsel, appearing in 28 U.S.C. 2261(c)–(d). Some commenters stated that the rule should be modified to provide additional definition concerning these procedures, such as specifying in greater detail what constitutes a sufficient offer of counsel, or what exactly will or will not be deemed a valid waiver of counsel, under these provisions.

The comments received did not provide persuasive reasons for addressing additional interpretive issues in this rule. Chapter 154’s legal directive to the Attorney General regarding rulemaking is that the Attorney General “shall promulgate regulations to implement the certification procedure under [section 2265(a)],” 28 U.S.C. 2265(b). Some of the specific matters raised in the comments have been addressed by courts in prior decisions relating to chapter 154, but there is no requirement that the present rule attempt to provide a comprehensive restatement or synthesis of all past judicial decisions under the chapter. Though the Attorney General has provided further definition of the chapter 154 requirements in § 26.22 of this rule, in the interest of affording additional guidance regarding what must be done to qualify for certification under chapter 154 and what criteria will be applied in making certification decisions, that does not oblige the Attorney General to go further and attempt to resolve in this rule (even if it were possible) all possible questions that might arise in the interpretation and application of chapter 154’s requirements.

It is uncertain whether particular interpretive questions raised by the commenters will prove to be significant issues in the context of the capital counsel systems of States that actually apply for certification hereafter. If they do not, then little will have been gained by the Attorney General’s attempt to resolve them in advance. If they do prove to be significant issues,

considering them in the concrete setting of State systems whose certification is requested is likely to be more conducive to sound resolutions than trying to address them in the abstract.

Section 26.22(b)–(c)—General Issues

Paragraphs (b) and (c) in § 26.22 articulate the requirements relating to counsel competency and compensation. Each paragraph consists of “benchmark” provisions identifying standards that presumptively will be considered adequate (§ 26.22(b)(1) for competency and § 26.22(c)(1) for compensation), followed by general provisions for assessing State standards that take other approaches (§ 26.22(b)(2) for competency and § 26.22(c)(2) for compensation).

The text of the rule published in the notice of proposed rulemaking stated without qualification that the Attorney General *will* approve State standards satisfying the benchmark provisions. Many commenters expressed the concern that, under the proposed rule, the Attorney General could have been required to certify a State’s mechanism meeting the competence and compensation benchmarks, even if it could be shown that the mechanism is not adequate in the context of the State system in which it operates.

The Department continues to believe that State mechanisms that incorporate the benchmark standards for competency and compensation should be adequate. However, the comments were persuasive that it is not possible to predict with certainty that these benchmarks will be adequate in the context of every possible State system. For example, it is conceivable that a State standard authorizing what normally should be sufficient compensation may not in fact make competent lawyers available for appointment in postconviction proceedings, considering the context of a particular State system and its distinctive market conditions for legal services. *Cf. Baker v. Corcoran*, 220 F.3d 276, 285–86 (4th Cir. 2000) (considering per-attorney overhead costs and effective compensation rates among other factors in finding compensation

scheme inadequate under chapter 154). The final rule has accordingly been modified, as discussed in the supplemental notice of proposed rulemaking, to provide that State standards satisfying the benchmarks for competency and compensation are *presumptively* adequate, thereby affording latitude to consider State-specific circumstances that may establish the contrary—i.e., that standards generally expected to be sufficient in most instances are for some reason not reasonably likely to lead to the timely provision and adequate compensation of competent counsel to habeas petitioners in a particular State. 77 FR at 7561.

Importantly, however, the Department found unpersuasive commenters’ separate criticism that the proposed rule fails to provide for oversight of a State’s compliance with a chapter 154 mechanism that it has established. As explained earlier in this preamble, the Department remains of the view that chapter 154 is correctly read to assign to the Federal habeas courts—not to the Attorney General—questions concerning whether a State has fully complied in a given case with the requirements of its own established mechanism.

Section 26.22(b)(1)(i)—Counsel Competency Standards Based on 18 U.S.C. 3599

Section 26.22(b)(1)(i) in the final rule sets forth competency standards requiring at least five years of bar admission and three years of postconviction litigation experience, or if a State mechanism so provides, allowing appointment for good cause in a given case of other counsel whose background, knowledge, or experience would otherwise enable him or her to properly represent the petitioner. Section 26.22(b)(1)(i) is based on the qualification standards Congress has adopted in 18 U.S.C. 3599 for appointment of counsel in Federal court proceedings in capital cases. The formulation of this provision in the final rule to require three years of postconviction litigation experience differs from the corresponding provision in the proposed rule, which required three years of felony litigation experience, without specification of the stage or stages of

litigation at which the experience was obtained. The reasons for this change are explained below.

In response to the proposed rule, many commenters suggested that postconviction litigation experience would be a better measure of competency for State postconviction proceedings than general felony litigation experience because of the difficult and unique demands that postconviction law and procedure place on attorneys who litigate those cases. These comments were persuasive.

In construing chapter 154, some courts have concluded that, given the complexity of postconviction law and procedure, a qualifying mechanism for the appointment of competent counsel should provide for counsel with specialized postconviction litigation experience. *See, e.g., Colvin-El v. Nuth*, No. Civ.A. AW 97-2520, 1998 WL 386403, at *6 (D. Md. July 6, 1998) (“Given the extraordinarily complex body of law and procedure unique to postconviction review, an attorney must, at minimum, have some experience in that area before he or she is deemed ‘competent.’”); *see also* Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services, Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* 88 (Sep. 2010) (noting the view of postconviction specialists that there is “little time available for inexperienced counsel to ‘learn the ropes,’ and no safety net if they fail”). Several States have also incorporated this guidance into their appointment standards. *See, e.g.,* La. Admin. Code tit. 22, 915(D)(1)(e)(i) (requiring that qualified postconviction lead counsel shall “have at least five years of criminal postconviction litigation experience.”); Miss. R. App. P. 22(d)(5) (generally requiring prior experience in at least one postconviction proceeding for appointment); Mo. Ann. Stat. § 547.370(2)(3) (requiring at least one of two appointed counsel to have “participated as counsel or

co-counsel to final judgment in at least five postconviction motions involving class A felonies in either state or federal trial courts”). The adaptation of the section 3599 standard in the final rule accordingly specifies three years of postconviction litigation experience, rather than three years of any sort of felony litigation experience as in the proposed rule.

The formulation of this benchmark in the final rule to require postconviction experience does not take issue, as some commenters claimed, with Congress’s judgments regarding counsel competency standards that are likely to be adequate. Rather, both the proposed and final versions reflect necessary adaptation of the standards of 18 U.S.C. 3599 for use in chapter 154 certification decisions. In defining relevant prior litigation experience, 18 U.S.C. 3599(b) and (c) deem prior trial experience relevant for trial appointments, and prior appellate experience relevant for appointments “after judgment.” The statute does not provide an experience requirement tailored specifically to postconviction proceedings, having no separate specification about the experience required for appointments to provide representation “after judgment” in postconviction proceedings as opposed to representation “after judgment” on appeal. If section 3599’s standards were transcribed as literally as possible in § 26.22(b)(1)(i), the rule would state that a State competency standard is presumptively adequate if it normally requires three years of appellate experience as a precondition for appointment in postconviction proceedings. But chapter 154 differs from section 3599 in that chapter 154 deals exclusively with postconviction proceedings. Prior postconviction litigation experience (as opposed to prior appellate experience) is more similar in character to the postconviction litigation for which an attorney would be appointed pursuant to chapter 154, and more likely on the whole to enable the attorney to provide effective representation in postconviction proceedings. The rule accordingly follows the sensible approach of referring to prior postconviction litigation experience in defining an

experience standard that will presumptively be considered adequate for appointments in the postconviction proceedings addressed by chapter 154.

The Criminal Justice Act (CJA) guidelines promulgated by the Judicial Conference of the United States counsel courts to consider postconviction experience when making appointments under 18 U.S.C. 3599. *See* 7A Guide to [Federal] Judiciary Policy 620.50 (last rev. 2011) (“CJA Guidelines”), *available at*

<http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/GuideToJudiciaryPolicyVolume7.aspx>. To be sure, the CJA Guidelines are not absolute requirements even in Federal habeas matters; the guidelines are phrased in permissive terms and elaborate in part on 18 U.S.C. 3005, *see* CJA Guidelines 620.10.10(a), 620.30, which concern appointment of counsel for trial representation in Federal capital cases and does not apply to appointments for collateral proceedings in State capital cases. *Compare* 18 U.S.C. 3005 *with* 18 U.S.C. 3599. However, the Department does agree that the CJA Guidelines may at times help to inform determinations as to appropriate standards for appointment of counsel, and so understood, the Department is ultimately convinced that the guidelines’ advice to consider postconviction experience is sound. The final rule therefore avoids the anomaly that would result from an overly formalistic adaptation of 18 U.S.C. 3599 and instead carries out the adaptation in a manner in which the prior litigation experience requirement is more finely attuned to the nature of the proceedings—i.e., postconviction proceedings—in which appointments are to be made.

The Department was not convinced, however, by commenters who asserted that this benchmark is deficient (or the other counsel competency provisions of the rule are deficient) because it does not require appointed counsel to have prior experience in *capital* postconviction proceedings, or at a minimum, some prior capital litigation experience generally. While prior

capital litigation experience is frequently a relevant and valuable asset for an attorney assigned to handle postconviction matters, *see Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996), and is also a factor that the CJA Guidelines say courts should consider in Federal capital cases, the Department was ultimately unpersuaded that prior capital litigation experience must be required categorically as a precondition of competence under chapter 154. When setting competency requirements for appointed counsel in the IPA, *see infra*, Congress has not mandated that appointed attorneys invariably have such experience. 42 U.S.C. 14163(e). Similarly, courts and others have recognized that prior capital case experience should not be regarded as a sine qua non of an appropriate competency standard for postconviction counsel. *See, e.g., Spears*, 283 F.3d at 1013 (“Nothing in [chapter 154] or in logic requires that a lawyer must have capital experience to be competent.”); ABA Guidelines, at 37 & n. 109 (noting that “[s]uperior postconviction death penalty defense representation has often been provided by members of the private bar who did not have prior experience in the field” and stating that such counsel should be appointed if the client will receive high quality legal representation).

Next, and more broadly, some commenters contended that any competency measure based solely on prior experience will necessarily be insufficient under chapter 154 and criticized the Section 26.22(b)(1)(i) benchmark (and § 26.22(b)(2)) on that basis. Many of these comments urged the view that a State system that relies on prior experience must also incorporate procedures for monitoring counsel performance following appointment and for removal of poorly performing attorneys. The rule remains unchanged in response to these comments. 18 U.S.C. 3599 reflects a Congressional judgment that sufficiently robust experience requirements alone can be sufficient. Further, when Congress amended chapter 154 in 2006, it could have required all State mechanisms to adopt monitoring and removal provisions similar to those it

required in the IPA in 2004, *see* 42 U.S.C. 14163(e)(2)(E), if it viewed such provisions as indispensable, but Congress did not do so. Thus, monitoring or removal requirements are not included in the rule's benchmark based on 18 U.S.C. 3599. *But see* § 26.22(b)(1)(ii) and discussion *infra*. However, their omission should not displace or affect the existence and operation of more generally applicable monitoring or removal procedures (e.g., disbarment) that a State may have in place, nor should it in any way discourage States from choosing to adopt monitoring and removal provisions as a discretionary matter.

One of the comments argued that the standards applicable under section 3599 to Federal habeas counsel should be considered inadequate for appointment of counsel in State collateral proceedings, on the ground that Federal habeas counsel has the benefit of the antecedent work of State collateral counsel in developing and presenting claims, and accordingly need lesser skills. However, the standards of section 3599 apply to Federal habeas counsel regardless of what prior representation or process has or has not been provided in State proceedings. Also, the same standards apply under section 3599 to counsel in Federal court collateral proceedings in Federal capital cases which, like State court collateral proceedings in State capital cases, are normally preceded only by trial and appeal.

Some commenters also objected to the exception language in the section 3599-based benchmark that allows appointment of counsel not meeting its specific litigation experience requirement in some circumstances. This exception appropriates the standard of 18 U.S.C. 3599(d), which allows courts, for good cause, to appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty (i.e., capital punishment) and the nature of the litigation. We expect that allowing this type of departure will not unduly negate or undermine

the specific experience requirement of this aspect of the rule, since its formulation limits its applicability to exceptional cases. It requires good cause for the court to appoint counsel other than those satisfying the specific experience requirement, and requires the court to verify that such counsel have other characteristics qualifying them to meet the demands of postconviction capital punishment litigation. In the rule, as in section 3599, the exception recognizes that insisting on a rigid application of a defined experience requirement could debar attorneys who are well-qualified on other grounds to represent capital petitioners. The comments provided no persuasive reason to deny this latitude in State court collateral proceedings in capital cases, which Congress has deemed appropriate for Federal court collateral proceedings (and other Federal court proceedings) in capital cases. *See* 18 U.S.C. 3599(d); *cf. Ashmus*, 123 F.3d at 1208 (recognizing that “habeas corpus law is complex and has many procedural pitfalls” but concluding that it is not necessary under chapter 154 that every lawyer have postconviction experience), *rev’d on other grounds*, 523 U.S. 740 (1998).

Though the Department therefore believes there is good reason to retain the availability of the exception to § 26.22(b)(1)(i)’s years of experience requirement that is drawn from 18 U.S.C. 3599(d), the rule is permissive, not mandatory, on this point. If a State decides to omit the exception in its mechanism, such that appointed attorneys will invariably need to have been admitted to the bar for five years and have three years of postconviction litigation experience, that omission will not result in a determination that it has failed to satisfy the § 26.22(b)(1)(i) benchmark.

Finally, some commenters objected to this revision of the benchmark as unduly limiting State discretion regarding the formulation of their counsel competency standards. However, use of this particular standard as a benchmark does not convey or depend on a judgment that other

approaches States may choose to adopt are necessarily illegitimate or inadequate for purposes of chapter 154. Rather, other standards may be presented for the Attorney General’s consideration under § 26.22(b)(2), and they will be approved if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

Section 26.22(b)(1)(ii)—Counsel Competency Standards Based on the Innocence Protection Act

Section 26.22(b)(1)(ii) identifies the establishment of qualification standards for appointment in conformity with the procedures of the IPA as another potential means of satisfying chapter 154.

The text of the rule published in the notice of proposed rulemaking framed the benchmark in terms of “meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) [and] (2)(A).” These provisions concern the nature and composition of capital counsel appointment or selection entities, 42 U.S.C. 14163(e)(1), and provide that the appointing authority or an appropriate designated entity must “establish qualifications for attorneys who may be appointed to represent indigents in capital cases,” 42 U.S.C. 14163(e)(2)(A).

Numerous comments on the proposed rule related to how many of the IPA provisions should be imported into the rule’s benchmark. Commenters noted that the benchmark as formulated in the proposed rule did not capture the full range of IPA provisions bearing on the qualifications counsel must meet to be eligible for appointment. In particular, subparagraphs (e)(2)(B), (D), and (E) in 42 U.S.C. 14163 require maintenance of a roster of qualified attorneys, specialized training programs for attorneys providing capital case representation, monitoring the performance of attorneys who are appointed and their attendance at training programs, and removal from the roster of attorneys who fail to deliver effective representation, engage in

unethical conduct, or do not participate in required training. These provisions are integral elements of the IPA qualification standards for appointments, because counsel who fail to measure up under these requirements become ineligible for subsequent appointments.

These comments were persuasive that the IPA-based provision in the proposed rule did not fully reflect the IPA system relating to qualifications for appointment because of the omission of reference to subparagraphs (e)(2)(B), (D), and (E) in the statute. The omission has been corrected in § 26.22(b)(1)(ii) in the final rule.

The supplemental notice of proposed rulemaking included this change in the IPA-based benchmark. *See* 77 FR at 7560. Some of the commenters responding to the supplemental notice questioned the continued omission of certain other IPA provisions, particularly the IPA requirements relating to appointment of two counsel, and the IPA requirements concerning compensation of counsel. *See* 42 U.S.C. 14163(e)(2)(C), (F). Counsel compensation is addressed in a different part of this rule, which includes benchmarks similar to the IPA provisions. *See* § 26.22(c)(1)(ii) and (iv) in the final rule and the related discussion below.

Regarding the number of counsel, chapter 154 does not require States to appoint more than one attorney (as part of a defense team) for postconviction representation. Rather, the applicable statute frames the potential appointment of multiple postconviction counsel as a discretionary matter. *See* 28 U.S.C. 2261(c)(1) (State capital counsel mechanism must provide for court order “appointing one or more counsels to represent the prisoner”). The Department believes there is no sound basis to eliminate the discretion chapter 154 contemplates by its own terms through a rule that forecloses certification of State mechanisms that provide for the appointment of only one attorney.

Furthermore, the IPA itself requires appointment of two counsel, with some exception, in the context of counsel standards that do not differentiate between different stages in the litigation of capital cases and that are principally concerned with the trial stage. *See* 42 U.S.C. 14163(c)–(d) (providing that IPA funding is to be used for effective systems for providing competent legal representation at all stages, with general requirement that at least 75% be used in relation to trial representation and at most 25% in relation to appellate and postconviction representation). In adapting the IPA standards to the context of chapter 154, which concerns only representation in postconviction proceedings, some flexibility on the question whether multiple counsel should be required is appropriate and accords with relevant congressional judgments in related contexts. As noted, chapter 154 itself frames the appointment of multiple postconviction counsel as a discretionary matter. 28 U.S.C. 2261(c)(1). Likewise, in relation to Federal capital cases and Federal habeas corpus review of State capital cases, Congress has required appointment of two counsel at trial but has made appointment of more than one counsel at later stages a discretionary matter. *Compare* 18 U.S.C. 3005 (court to “assign 2 . . . counsel” for trial representation) *with* 18 U.S.C. 3599(a) (requiring in provisions applicable at later stages “appointment of one or more attorneys”). The rule takes a similar approach when adapting the IPA standards in the chapter 154 context by permitting, but not requiring, State mechanisms to provide for appointment of two attorneys to represent a capital petitioner on collateral review.

Additionally, § 26.22(b) in the rule articulates the statutory requirement that a State provide for the appointment of competent counsel in State postconviction proceedings and provide standards of competency for the appointment of such counsel. 28 U.S.C. 2265(a)(1)(A), (C). As discussed above, this means that States must have qualification standards that counsel must meet to be eligible for appointment and that the Attorney General finds adequate. The IPA

provisions included in § 26.22(b)(1)(ii) in the final rule fit within this framework because they are integral to the IPA's specification of qualifications that counsel must meet to be eligible for initial or subsequent appointments. The same would not be true of specifications concerning the number of counsel to be appointed.

As to a separate issue, another comment criticized this benchmark on the ground that it does not prescribe definite qualification standards for appointment of counsel, but rather endorses any standards adopted in conformity with the IPA procedures. However, chapter 154 directs the Attorney General to determine whether the State provides standards of competency for appointment of competent counsel in State capital collateral proceedings, and whether the State's mechanism incorporating such standards will reasonably assure the appointment of competent counsel. It does not require the Attorney General to specify directly the required content of such standards. The corresponding provisions of the IPA reflect a judgment by Congress that qualification standards adopted in conformity with the IPA procedures will be adequate. This judgment is appropriately adopted in defining one of the means by which States may seek to satisfy the requirements of chapter 154.

Section 26.22(b)(2)—Other Counsel Competency Standards

Section 26.22(b)(2) in the rule provides that the Attorney General may find other competency standards for the appointment of counsel adequate if they reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases. Some commenters criticized this provision as overly indefinite and urged that the rule should provide for assessment of State capital counsel competency standards only under clearly defined criteria.

Many of these critical comments are premised at least partly on the view that the Attorney General has a conflict of interest under chapter 154. The commenters viewed this

alleged conflict as exacerbated by § 26.22(b)(2) and urged that the rule eliminate or drastically limit any opportunity for the Attorney General to exercise judgment or discretion in evaluating the adequacy of a State capital counsel mechanism. The Department rejects the premise that the Attorney General has a conflict, for reasons discussed above, and therefore finds the comments predicated on that view unpersuasive.

Also, as explained earlier, the Department believes States should retain some significant discretion to formulate and apply counsel competency standards, and § 26.22(b)(2) as drafted appropriately preserves that discretion. There are any number of ways in which a State might adopt measures of experience, knowledge, skills, training, education, or combinations of those considerations in devising a standard that would reasonably assure the appointment of counsel who are competent to conduct postconviction litigation in capital proceedings. Revising § 26.22(b)(2) to provide only very specific, one-size-fits-all criteria is accordingly impractical and would risk foreclosing innovative efforts by States to devise robust standards, even standards that would unquestionably result in the timely appointment of competent counsel.

Furthermore, before Congress reassigned the certification function from the Federal courts to the Attorney General by the 2006 amendments to chapter 154, courts did not assess the adequacy of State counsel competency standards constrained by rigid, pre-announced criteria; they were guided instead by the terms of chapter 154 itself and the facts in a particular case. *See, e.g., Spears*, 283 F.3d at 1012–15; *Ashmus*, 123 F.3d at 1208; *Hill*, 941 F. Supp. at 1142–43. The 2006 amendments changed the decision-maker for purposes of making judgments about the overall adequacy of State systems under chapter 154, but the amendments do not suggest that the Attorney General’s discretion to evaluate the adequacy of State competency standards must be constrained by a one-size-fits-all approach. Had Congress questioned the Attorney General’s

ability to exercise discretion soundly or believed that more specific guidance was necessary, it could have amended the statutory scheme to specify more detailed requirements that State mechanisms must meet when it transferred the certification function to the Attorney General—but Congress did not do so.

This is not to say, as some comments contend, that § 26.22(b)(2) affords a State unbounded discretion to establish any sort of competency standards and still obtain certification of its mechanism under chapter 154. The notice and supplemental notice of proposed rulemaking described the two approaches now reflected in paragraph (b)(1) of the rule as benchmarks, and they function precisely in that manner. That is, the criteria in paragraph (b)(1) do not simply identify two competency standards that will entitle a State that adopts them to a presumption of adequacy; they also serve as a point of reference in judging the adequacy of other counsel qualification standards that States may establish and offer for certification by the Attorney General. A State mechanism that does not incorporate the benchmark standards will naturally require closer examination by the Attorney General to ensure that it satisfies the statutory standards, and while it is possible to conceive of a variety of alternative competency measures that would satisfy chapter 154's requirements, State competency standards that appear likely to result in significantly lower levels of proficiency compared to the benchmark levels risk being found inadequate under chapter 154. For clarity, the text of the proposed rule has been revised to reflect this understanding, namely, that the paragraph (b)(1) standards function as benchmarks and are relevant to the Attorney General's assessment of alternative competency standards for which certification would be predicated on § 26.22(b)(2).

This explanation also responds to another comment, which complains that the provision appearing in the final rule as § 26.22(b)(2) is overly restrictive, on the ground that it limits the

possibility of approval of State competency standards to situations in which they are “functionally identical to or more stringent than” the particular benchmark standards described in § 26.22(b)(1). This comment reflects a misunderstanding of the rule. The analysis statement in the proposed rule noted in relation to the benchmarks that States’ adoption of competency requirements that are similar or that are likely to result in even higher levels of proficiency will weigh in favor of a finding of adequacy for purposes of chapter 154, *see* 76 FR at 11709, and a statement to the same effect appears in the section-by-section analysis for this final rule. However, it is not similarity in form to the presumptively adequate standards that section (b)(2) contemplates, and the standards need not function in an identical matter. Rather, § 26.22(b)(2) contemplates a close equivalence in terms of the expectation that a proffered mechanism will reasonably assure an appropriate level of proficiency in appointed counsel. As the analysis statement explained and this preamble repeats, Congress intended the States to have significant discretion regarding competency standards, within reasonable bounds, and the particular benchmarks identified in the rule do not exhaust the means by which States may satisfy chapter 154’s requirements.

Section 26.22(c)—Compensation of Counsel

Section 26.22(c)(1)(i) refers to the compensation of counsel pursuant to 18 U.S.C. 3599 in Federal habeas corpus proceedings reviewing State capital cases. The Department received no comments that were specifically critical of this standard, which remains unchanged in the final rule.

The compensation standards for appointed capital counsel in State collateral proceedings described in § 26.22(c)(1)(ii) and (iv) in the rule involve compensation comparable to that of retained counsel meeting sufficient competency standards or attorneys representing the State in

such collateral proceedings. Some comments were critical of these benchmarks as setting an inadequate level of compensation. However, as explained in the accompanying analysis statement for the rule, these parts of the rule are similar to legislative judgments in the IPA endorsing compensation of capital defense counsel at market rates or at a level commensurate with that of prosecutors. 42 U.S.C. 14163(e)(2)(F)(ii)(I); *see also* ABA Guidelines § 9.1(B)(2), at 49 (same). The comments provided no persuasive reason to reject this legislative judgment in the context of chapter 154, or to believe that compensating appointed capital defense counsel at higher levels than competent retained counsel or counsel representing the State in the same proceedings will generally be necessary to induce a sufficient number of competent attorneys to provide representation.

Section 26.22(c)(1)(iii) in the rule refers to compensation comparable to the compensation of appointed counsel in State appellate or trial proceedings in capital cases. The accompanying explanation in the analysis statement for this rule explains that the compensation afforded for trial and appellate representation is likely to be sufficient to secure the availability of an adequate pool of competent attorneys to provide postconviction representation, because that level of compensation is necessarily sufficient to ensure an adequate number of attorneys are available to provide representation in trials and appeals, where representation by counsel is constitutionally required.

Some commenters criticized this provision as overly permissive on the ground that trial and appellate counsel may be underpaid and that such counsel are sometimes found to have provided constitutionally ineffective assistance. However, that is not an occurrence that can be infallibly guarded against by any level of compensation at any stage of criminal proceedings. Moreover, the proposed rule has been modified to afford the Attorney General latitude to

consider any unusual circumstances presented by a particular State system that indicate that the level of compensation called for in this benchmark is unlikely to function as expected. It is conceivable in the context of a particular State and its distinctive market conditions for legal services, for example, that what normally should be sufficient compensation may not in fact be reasonably likely to make competent lawyers available for timely provision to capital petitioners in State postconviction proceedings. *Cf. Baker*, 220 F.3d at 285–86 (considering per-attorney overhead costs and effective compensation rates among other factors in finding compensation scheme inadequate under chapter 154).

Nevertheless, the Attorney General does not exercise limitless discretion to pass judgment on whether State compensation authorizations are sufficiently generous under chapter 154, which provides in relevant part simply that the Attorney General is to determine “whether the State has established a mechanism for the appointment [and] compensation . . . of competent counsel.” 28 U.S.C. 2265(a)(1)(A). The formulation of the rule on this point reads the statutory scheme to allow the Attorney General to review the adequacy of State compensation provisions in the interest of promoting sufficient financial incentives to secure the appointment of competent counsel in sufficient numbers to timely provide representation to capital petitioners in State collateral proceedings. The Attorney General will consider any available relevant information, including the effective hourly rate for appointed attorneys, in evaluating a mechanism’s compensation standards. But the comments critical of the § 26.22(c)(1)(iii) benchmark, which raised concerns with funding for appointment of counsel in particular cases or in particular States, were not sufficiently persuasive that compensation that adequately motivates counsel to accept appointments for the trial and appeal of capital cases (in which they are held to provision of constitutionally effective assistance) will generally be unlikely to provide sufficient

incentives for competent counsel to provide representation in State collateral proceedings satisfying the standards of chapter 154.

Section 26.22(c)(2) in the rule allows approval of other approaches to compensation, but “only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of [competent] counsel.” Some commenters criticized this provision as vague and urged that the rule be modified so that chapter 154 certification could be granted only if a State’s counsel compensation provisions satisfy definite criteria stated in the rule.

As with the corresponding comments on § 26.22(b)(2), these comments in part reflected an assumption that the Attorney General has a conflict of interest in carrying out his legal duties under chapter 154, and the response is much the same. The underlying assumption of a conflict of interest is not well-founded, for reasons discussed above. Additionally, § 26.22(c)(2) is consistent with the Department’s recognition that a State should have significant latitude in designing a capital counsel mechanism that (among other things) are tailored to the State’s unique characteristics and market conditions. As already noted, the provision affords States appropriate discretion to set alternative levels of compensation that will reasonably assure the timely appointment of competent counsel but that might otherwise be foreclosed by an overly specific ex ante requirement. At the same time, as explained above in connection with § 26.22(b)(2), a State’s latitude to consider alternative compensation standards, and the Attorney General’s assessment of any such standards, is not unbounded. The rule identifies four benchmarks that will continue to guide the Attorney General’s evaluation of other proposed standards—as the text of the proposed rule has similarly been revised to clarify.

Section 26.22(d)—Reasonable Litigation Expenses

Section 26.22(d) in the rule reflects the requirement to provide for payment of reasonable litigation expenses. Some commenters criticized this provision as not sufficiently specific regarding the types of expenses that must be defrayed and the means of evaluating what expenditures are reasonable. They accordingly urged more definite specification concerning these matters in the rule, such as explicitly requiring payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel, and providing standards for evaluating the reasonableness of compensation for persons in each category.

The comments raise an important issue for consideration. The Department recognizes that investigators, mental health and forensic experts, and other support personnel often contribute critical services in capital postconviction cases. The Department agrees that payment of such individuals, among other expenses that may arise in the context of a particular case, are litigation expenses that should merit reimbursement if reasonable, and the text of § 26.22(d) has been modified in the final rule to clarify this point. *See* ABA Guidelines, at 128 (“[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7 . . . [including] discover[ing] mitigation that was not presented previously, [and] identify[ing] mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.”); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (“[W]e long have referred [to ABA Standards] as guides to determining what is reasonable.” (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (internal quotation marks omitted))).

However, the language of section 2265 does not suggest that the Attorney General must enumerate the universe of litigation expenses that merit reimbursement. Rather, the relevant statutory directive to the Attorney General is to determine whether the State has established a mechanism for the “payment of reasonable litigation expenses.” 28 U.S.C. 2265(a)(1)(A). The

comments on this issue did not persuasively establish that a State should be denied chapter 154 certification if its mechanism requires the payment of reasonable litigation expenses in terms similar to chapter 154 itself, or at some other level of generality less specific than that urged by the commenters. *See Spears*, 283 F.3d at 1016 (“[Chapter 154] requires only that the state mechanism provide for the payment of reasonable litigation expenses. The federal statute thus assumes that a state can assess reasonableness as part of its process.”); *see also* Gould & Greenman, *supra*, at 31–32, 78, 122 (2010) (provision for Federal court proceedings in capital cases, which refers generally to fees and expenses for investigative, expert, and other reasonably necessary services, states that payment for these purposes shall not exceed \$7,500 unless approved for a higher amount by the circuit chief judge or delegate—but the median reimbursable cost that Federal courts approved in capital cases between 1998 and 2004 was \$83,000).

Importantly, though, as with other requirements under chapter 154, satisfaction of the requirement regarding payment of reasonable litigation expenses requires that States have standards in force that so provide. The Attorney General will consider all relevant aspects of State standards in ascertaining whether the statutory requirements have been satisfied. Thus, as § 26.22(d) states, a general provision requiring payment of reasonable litigation expenses would not be sufficient if negated by rigid payment caps with no authorized means for payment of necessary expenses above such limits, and the Attorney General would similarly consider whether such a provision is negated by State policy that precludes payment for certain categories of expenses that may be reasonably necessary. Moreover, as with other requirements, the Attorney General is not dependent on the State’s representations, and any interested person or entity believing that State standards overall do not provide for payment of reasonable litigation

expenses is free to bring relevant information to the Attorney General’s attention through the comment procedure set out in § 26.23 in the rule.

Comments responding to the supplemental notice of proposed rulemaking suggested that satisfaction of § 26.22(d) should only be considered presumptively adequate for purposes of chapter 154, paralleling the “presumptively” qualifier applicable to the benchmark provisions relating to counsel competency and compensation, which appear in § 26.22(b)(1) and (c)(1) in the final rule. The “presumptively” qualifier is neither necessary nor appropriate here because § 26.22(d) incorporates no benchmark provisions. It articulates the requirement relating to payment of litigation expenses under chapter 154, and States that have established mechanisms that meet this requirement have done what chapter 154 requires in this connection. Its proper counterpart is not the benchmark provisions in § 26.22(b)(1) and (c)(1), but the general articulations of the chapter’s requirements relating to counsel competency and compensation in § 26.22(b)(2) and (c)(2), which similarly do not need or have a “presumptively” qualifier.

Section 26.23(a)–(c)—Certification Procedure

These provisions in the rule specify the procedure for the Attorney General to receive requests for chapter 154 certification, obtain public comment on the requests through Internet posting and *Federal Register* publication, and make and announce the certification decision.

Some commenters objected that the public notice and comment procedure of the rule is inadequate and that the Attorney General must engage in additional fact-finding processes. These objections are premised on an incorrect understanding of the nature and scope of the Attorney General’s certification determination, as explained earlier in this preamble. The Attorney General’s decision to certify an established State mechanism under chapter 154 need not be supported by a data-intensive examination of the State’s record of compliance with the

established mechanism in all or some significant subset of postconviction cases; for instance, certification should not be foreclosed for a State that cannot submit the information the commenters identify because it has established new standards that satisfy the statutory requirements but for which there is no pre-existing record of compliance. The comments provided no persuasive reason to believe that the rule's procedure, under which the Attorney General will publish a State's request for certification and invite interested parties and the State seeking certification to be heard via written submissions during one or more public comment periods, will be inadequate to provide the information needed for the determinations that the Attorney General actually must make under chapter 154. Moreover, the Attorney General's certifications under chapter 154 are orders rather than rules for purposes of the Administrative Procedure Act (APA). They are accordingly not subject to the APA's rulemaking provisions, *see* 5 U.S.C. 553, much less to the APA's requirements for rulemaking or adjudication required to be made or determined on the record after opportunity for an agency hearing, *see* 5 U.S.C. 553(c), 554, 556, 557.

The Department does not believe, as some commenters urged, that it is necessary to specify detailed information concerning State capital collateral review systems that States must include in their requests for chapter 154 certification. For the reasons already given, these comments were similarly based on an incorrect understanding of the nature and scope of the Attorney General's certification determination. Chapter 154 itself and this rule explain what States must do to qualify for chapter 154 certification. Under the procedures of § 26.23, States will be free to present any and all information they consider relevant or useful to explain how the mechanism for which they seek certification satisfies these requirements. Likewise, through the public comment procedure of the rule, any other interested person or entity will be free to submit

any information it may wish in support of, or in opposition to, the State's request—including information that the mechanism submitted for certification has not been established because its standards are actually negated or overridden by contrary State policy. Further, the proposed rule has been revised to make clear that the Attorney General may permit more than one period for comment to allow the requesting State or any interested parties further opportunity for submission of views or information. The comments provided no persuasive reason for an across-the-board imposition of more definite informational requirements beyond that.

Comments also proposed that the rule require the Attorney General to give personal notice to certain entities concerning a State's submission of a request for chapter 154 certification, such as capital defense entities in the requesting State. In any particular State, there may be a large number of organizations and individuals who are involved in capital defense work or who would be interested in a State's request for chapter 154 certification for other reasons. It is not feasible for the Attorney General to attempt to identify and personally notify all of them. Nor should the Attorney General be in the position of having to pick and choose, identifying certain persons or organizations as sufficiently interested or important to receive personal notice, when others will not receive such notice. Such personal notice requirements, in any event, are unnecessary, because the State's request will be made publicly available on the Internet and in the *Federal Register* as provided in § 26.23(b).

Section 26.23(c) states that if certification is granted, the certification will be published in the *Federal Register*. Some commenters urged that denials of certification also be published in the *Federal Register*. However, the granting of chapter 154 certification by the Attorney General changes the Federal habeas corpus review procedures applicable in relation to capital cases in the State, so there is a clear interest in making it indisputable and publicly known that certification

has been granted, for which *Federal Register* publication is a convenient and sufficient means. The reasons for publicizing a denial of certification through official publication are less compelling because its legal effect is just to perpetuate the status quo. Publication of a denial of certification might alternatively serve the purpose of providing the predicate for an appeal of the Attorney General’s decision to the D.C. Circuit Court of Appeals. However, review by the D.C. Circuit would be pursuant to chapter 158 of title 28, *see* 28 U.S.C. 2265(c), which provides that “[o]n the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules.” 28 U.S.C. 2344. So the Attorney General has the option of giving notice by service to the State official who requested certification regarding the denial of the certification, and is not legally required to publish the denial. Considering the foregoing, the comments do not persuasively establish that the rule should be changed to require uniformly that the Attorney General publish denials of certification in the *Federal Register*.

Section 26.23(d)—Post-certification Occurrences

Section 26.23(d) in the rule addresses the effect of changes or alleged changes in a State capital counsel mechanism following certification by the Attorney General.

One commenter urged that more of the accompanying explanation regarding this provision in the analysis statement for the proposed rule be contained in the rule itself. The relevant portion of the analysis statement, 76 FR at 11710–11, in part noted that if a State abolishes its capital counsel mechanism following certification by the Attorney General, then 28 U.S.C. 2261(b)(2)’s requirement of appointment of counsel pursuant to the certified mechanism as a condition of chapter 154’s applicability cannot thereafter be satisfied, reflecting the obvious point that counsel cannot be appointed pursuant to something that no longer exists. The analysis

statement further noted that capital habeas petitioners may present claims to Federal habeas courts that subsequent changes or alleged changes in the certified mechanism effectively converted it into a new and uncertified mechanism, and hence section 2261(b)(2)'s requirement of appointment of counsel pursuant to the certified mechanism was not satisfied in their cases. This observation reflects no judgment by the Attorney General as to whether certain changes in a certified mechanism would affect the applicability of chapter 154, and, if so, under what circumstances or to what extent. That is a matter that Federal habeas courts may consider if capital petitioners raise claims of this nature under section 2262(b)(2). The rule says no more on this question because resolving it is not any part of the Attorney General's certification functions under chapter 154.

The analysis went on to note that in such circumstances, or in other circumstances in which there has been some change or alleged change in the State mechanism, the State could request a new certification by the Attorney General of its present capital counsel mechanism. That could avoid litigation in Federal habeas courts under 28 U.S.C. 2261(b)(2) over the present status of the State mechanism and ensure that determinations regarding satisfaction of chapter 154's requirements are made by the Attorney General, subject to review by the D.C. Circuit Court of Appeals, as contemplated by 28 U.S.C. 2261(b)(1) and 2265(c)(2). The rule does not need to be changed to make this point because § 26.23(d) in the rule already says that "[a] State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism."

Some comments urged that the rule should be changed to provide a means for decertification of State capital counsel mechanisms that the Attorney General has previously

approved. One of the comments pointed in this connection to 5 U.S.C. 553(e), which in part requires agencies to give interested persons the right to petition for the repeal of a rule. However, that provision is inapplicable to chapter 154 certifications, which are orders rather than rules, as noted above.

Decertification could conceivably be effected in one of two ways: (i) through some procedure for examination or oversight of State capital counsel mechanisms following their certification to ascertain whether they continue to measure up under chapter 154's standards, or (ii) through modification of the rule to provide that a certification automatically lapses based on subsequent changes in the capital counsel mechanism or other changed circumstances.

The argument for incorporating some provision for continual oversight and potential decertification of State capital counsel mechanisms is not persuasive for a number of reasons. First, the proposal conflates the functions assigned to the Attorney General and those reserved to Federal habeas courts under the current formulation of chapter 154, which limits the Attorney General's function to making general certification determinations upon request of an appropriate State official, *see* 28 U.S.C. 2261(b)(1), 2265(a)(1), and reserves case-specific inquiries affecting chapter 154's applicability to Federal habeas courts under 28 U.S.C. 2261(b)(2). Second, the chapter includes provisions that establish when a certification takes effect and direct the Attorney General to promulgate regulations to implement a certification procedure, *see* 28 U.S.C. 2265(a)(2), 2265(b), but no direction to the Attorney General to implement a decertification procedure. These considerations lead to the conclusion that day-to-day oversight and potential decertification of State capital counsel mechanisms are not among the Attorney General's authorized functions under chapter 154.

Regarding the idea that a certification would automatically lapse based on subsequent events, such an approach would pose difficulties in operation, most prominently that certification should not cease to apply merely because the change *might* affect satisfaction of the chapter 154 requirements, and that it is unclear *who* would determine whether a change in the capital counsel system might affect satisfaction of the chapter 154 requirements.

This rule accordingly responds to these difficulties by not including any provision for decertification, but providing in § 26.23(d) that a State may seek a new certification from the Attorney General to resolve uncertainties concerning chapter 154's continued applicability in light of subsequent changes or alleged changes in the State's certified capital counsel mechanism. This approach (i) avoids any question of legal consistency with chapter 154's definition of the Attorney General's authority and functions, and (ii) avoids the difficulties inherent in attempting to define *ex ante* and in the absence of any factual context the conditions and procedures for assessing whether and what changes to a State system should prompt a decertification review, but (iii) affords a means for resolution by the responsible authority under chapter 154 of questions that may arise in practice regarding the continued effectiveness of chapter 154 certifications.

Just as importantly, § 26.23(e), discussed below, provides that certifications are effective for a period of five years, thereby ensuring that a State capital counsel mechanism's current satisfaction of the chapter 154 requirements will be revisited at reasonable intervals. This addresses concerns about the possibility of subsequent changes in a State's system that could put it out of compliance with chapter 154, further reducing the force of any argument that a decertification procedure is needed.

Section 26.23(e)—Renewal of Certifications

Section 26.23(e) provides that certifications remain effective for a period of five years. The addition of this provision, which was not in the proposed rule but was described in the supplemental notice of proposed rulemaking, *see* 77 FR at 7562, is responsive to many comments that pointed out that changed circumstances may affect whether a once-certified mechanism continues to be adequate for purposes of chapter 154. For example, inflation or changed economic circumstances may mean that provisions authorizing compensation of counsel at a specified hourly rate, which were sufficient at the time of an initial certification decision, are no longer adequate after the passage of years. Or changes may occur in the standards constituting a State's postconviction capital counsel mechanism that affect their consistency with chapter 154.

Some commenters on the supplemental notice approved of this change but urged that the rule include more detail concerning the operation of the recertification process and the standards that would be applied in making recertification decisions. This is unnecessary because the process and standards for subsequent certification decisions are the same as those for initial certification decisions under the rule. The standards of § 26.22 will be applied in deciding whether a State's capital counsel mechanism for which recertification is requested satisfies the chapter 154 requirements, and the procedure set forth in § 26.23 will apply in entertaining, obtaining public input concerning, and deciding recertification requests.

Two commenters objected to limiting the duration of certifications on the grounds that chapter 154 does not provide for the termination of certifications and that the sponsor of the 2006 amendments to chapter 154 explained that they were intended to create a system of "one-time certification." *See* 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl). Regarding the statutory question, the statutory framework is unquestionably premised on the

continuing sufficiency of a mechanism once certified by the Attorney General. The quid pro quo that is the core and the animating purpose of chapter 154, procedural “benefits” for States if and only if they meet the statutory criteria, would cease to make sense if a certification were indefinitely and irrevocably effective even if—by virtue of changed circumstances, *see infra* (analysis statement)—the standards first put in place by a State no longer satisfied the statutory requirements. Providing for periodic review of certifications is fully consistent with the statutory text and avoids such an absurd result. If a statute requires an assessment of mutable conditions against legal standards, a reasonable time limit may be imposed on the effectiveness of a certification to ensure its continuing validity, even if the authorizing statute does not explicitly provide for a time limit. *See Durable Mfg. Co. v. U.S. Dep’t of Labor*, 578 F.3d 497, 501–02 (7th Cir. 2009) (upholding time limitation of validity of labor certificates in light of possible subsequent changes in economic circumstances affecting consistency with statutory requirements and objectives).

Regarding the statement by the sponsor of the amendment, it reflects a rejection of the idea of a continuing “compliance review” process or “decertification” procedure under chapter 154 in light of (i) “the substantial litigation burdens” that would likely result for States that have been certified, including “the cost of creating opportunities to force the State to continually litigate its chapter 154 eligibility,” (ii) the concern that “if such a means of post-opt-in review were created, it inevitably would be overused and abused,” and (iii) the judgment that States “are entitled to a presumption that once they have been certified as chapter-154 compliant, they will substantially maintain their counsel mechanisms.” 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl). The statement further viewed a decertification procedure as enabling adverse parties to embroil States in challenges to the continued validity of their capital

counsel mechanisms under chapter 154 based on case-specific deficits in their operation, such as delay in the appointment of counsel in particular cases for reasons beyond the State's control.

See id.

Considered as a whole, the sponsor's statement reflects concerns that would be implicated by the creation of a continuing oversight or decertification procedure for chapter 154. The Department, as discussed above, has not attempted to create such a procedure in the present rule.

The provision adopted in § 26.22(e) in the final rule does not implicate these concerns. It authorizes no person or entity to initiate challenges to the continuing validity of a certification, much less to involve a State in the uncertainty of perpetual litigation about the validity of a certification. Moreover, § 26.22(e) provides that certifications remain effective for an uninterrupted period of five years after the completion of the certification process by the Attorney General and any related judicial review. If recertification is requested at or before the end of that period, the rule provides that the prior certification will remain in effect until the completion of the recertification process by the Attorney General and any related judicial review.

Section 26.22(e) also does not implicate the concern about challenges based on case-specific non-compliance with State capital counsel mechanisms. Recertification decisions by the Attorney General will involve the same standards and procedures as initial certification decisions.

Finally, the inclusion of § 26.22(e) in the rule does not reflect an assumption that States are likely to abolish or materially weaken their chapter 154-compliant capital counsel mechanisms once they have been established. If no changes have occurred that take a State capital counsel mechanism out of compliance with chapter 154, then it will be recertified, and

the recertification process will provide a definitive means of establishing continued satisfaction of the chapter's requirements.

Section-by-Section Analysis

Section 26.20

Section 26.20 explains the rule's purpose of implementing the certification procedure for chapter 154. It is modified from the corresponding provision in the 2008 regulations to describe more fully the conditions for the applicability of chapter 154 under 28 U.S.C. 2261(b).

Section 26.21

Section 26.21 defines the terms "appropriate state official" and "state postconviction proceedings" in the same manner as the 2008 regulations, and adds a definition of "appointment" and "indigent prisoners."

Chapter 154 involves a quid pro quo arrangement under which States provide for the appointment of counsel for indigent petitioners in State postconviction proceedings in capital cases, and in return Federal habeas review is carried out with generally more limited time frames and scope following the State postconviction proceedings in which counsel has been made available. *See* 28 U.S.C. 2261–2266. In this context, not every provision for making counsel available in State postconviction proceedings, however belatedly, can logically be regarded as providing for the appointment of counsel in the sense relevant under the chapter. In particular, that would not be the case if the State capital counsel mechanism provided for the availability of counsel to represent indigent capital petitioners only after the deadline for pursuing State postconviction proceedings had passed; or only after the expiration of the time limit in 28 U.S.C. 2263 for Federal habeas filing; or only after such delay that the time available to prepare for and pursue State or Federal postconviction review had been seriously eroded. Section 26.21

accordingly defines “appointment” to mean “provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.”

Under 28 U.S.C. 2265(a), a certification request must be made by “an appropriate State official.” Prior to the 2006 amendments to chapter 154, Federal courts entertaining habeas corpus applications by State prisoners under sentence of death would decide which set of habeas corpus procedures applied—chapter 153 or chapter 154 of title 28—and State attorneys general responsible for such litigation could request determinations that their States had satisfied the requirements for the applicability of chapter 154. The 2006 amendments to chapter 154 were not intended to disable the State attorneys general from their pre-existing role in this area, and State attorneys general continue in most instances to be the officials with the capacity and motivation to seek chapter 154 certification for their States. *See* 73 FR at 75329–30. Section 26.21 of the rule accordingly provides that the appropriate official to seek chapter 154 certification is normally the State attorney general. In those few States, however, where the State attorney general does not have responsibilities relating to Federal habeas corpus litigation, the chief executive of the State will be considered the appropriate State official to make a submission on behalf of the State.

Section 26.21 defines “State postconviction proceedings” as “collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review.” Collateral review normally takes place following the completion of direct review of the judgment, but some States have special procedures for capital cases in which collateral proceedings and direct review may take place concurrently. Provisions that separately addressed the application of chapter 154 to these systems were replaced by the 2006 amendments

with provisions that permit chapter 154 certification for all States under uniform standards, regardless of their timing of collateral review vis-à-vis direct review. *Compare* 28 U.S.C. 2261(b), 2265 (2006) (as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005), *with* 28 U.S.C. 2261(b), 2265 (2000) (as enacted by AEDPA). *See generally* 152 Cong. Rec. S1620 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl) (explaining that the current provisions simplify the chapter 154 qualification standards, “which obviates the need for separate standards for those States that make direct and collateral review into separate vehicles and those States with unitary procedures”).

The definition of “State postconviction proceedings” in the rule reflects the underlying objective of chapter 154 to provide expedited Federal habeas corpus review in capital cases arising in States that have gone beyond the constitutional requirement of providing counsel for indigents at trial and on appeal by extending the provision of counsel to indigent capital petitioners in State collateral proceedings. *See* 73 FR at 75332–33, 75337 (reviewing relevant legislative and regulatory history). The provisions of chapter 154, as well as its legislative history, reflect the understanding of “postconviction proceedings” as specifically referring to collateral proceedings rather than to all proceedings that occur after conviction (e.g., sentencing proceedings, direct review). *See* 28 U.S.C. 2261(e) (providing that ineffectiveness or incompetence of counsel during postconviction proceedings in a capital case cannot be a ground for relief in a Federal habeas corpus proceeding); 28 U.S.C. 2263(a), (b)(2) (180-day time limit for Federal habeas filing under chapter 154 starts to run “after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review” subject to tolling “from the date on which the first petition for postconviction review or other collateral relief is filed until the final State court disposition of such petition”); 152 Cong. Rec.

S1620, 1624–25 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl) (explaining that chapter 154 provides incentives for States to provide counsel in State postconviction proceedings, referring to collateral proceedings); 151 Cong. Rec. E2639–40 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake) (displaying the same understanding); *see also, e.g., Murray v. Giarratano*, 492 U.S. 1 (1989) (using the terms postconviction and collateral proceedings interchangeably).

Section 26.22

Section 26.22 sets out the requirements for certification that a State must meet to qualify for the application of chapter 154. These are the requirements in 28 U.S.C. 2261(c)–(d) and 2265(a)(1).

Paragraph (a) of § 26.22—Appointment of Counsel

Paragraph (a) of § 26.22 sets out the requirements of chapter 154 concerning appointment of counsel that appear in 28 U.S.C. 2261(c)–(d).

Paragraph (b) of § 26.22—Competent Counsel

Paragraph (b) of § 26.22 explains how States may satisfy the requirement to provide for appointment of “competent counsel” and to provide “standards of competency” for such appointments. 28 U.S.C. 2265(a)(1)(A), (C).

The corresponding portion of the 2008 regulations construed the reference to appointment of “competent counsel” in section 2265(a)(1)(A) as a cross-reference to counsel meeting the competency standards provided by the State pursuant to section 2265(a)(1)(C). It accordingly treated the definition of such standards as a matter of State discretion, not subject to further review by the Attorney General. *See* 73 FR at 75331. However, these provisions may also reasonably be construed as permitting the Attorney General to require a threshold of

minimum counsel competency, while recognizing substantial State discretion in setting counsel competency standards. *See generally* OLC Opinion. The latter understanding is supported by cases interpreting chapter 154, *see, e.g., Spears*, 283 F.3d at 1013 (recognizing that “Congress . . . intended the states to have substantial discretion to determine the substance of the competency standards” under chapter 154 while still reviewing the adequacy of such standards), and by the original Powell Committee proposal from which many features of chapter 154 ultimately derive, *see* 135 Cong. Rec. 24696 (1989). This understanding is adopted in § 26.22(b) of the final rule.

The specific standards set forth in paragraph (b) are based on judgments by Congress in Federal laws concerning adequate capital counsel competency standards and on judicial interpretation of the counsel competency requirements of chapter 154. Section 26.22(b)(1) sets out two approaches that will presumptively be considered adequate to satisfy chapter 154—an option involving an experience requirement derived from the standard for appointment of counsel in Federal court proceedings in capital cases (paragraph (b)(1)(i)), and an option involving qualification standards set in a manner consistent with relevant portions of the IPA (paragraph (b)(1)(ii)). Section 26.22(b)(2) provides that States can satisfy chapter 154’s requirements by reasonably assuring an appropriate level of proficiency in other ways, such as by requiring some combination of experience and training.

As indicated in the introductory language in subsection (b)(1) of § 26.22, State capital counsel mechanisms will be regarded as presumptively adequate in relation to counsel competency if they meet or exceed the benchmark standards identified in the subsection. States will not be penalized for going beyond the minimum required by the rule. Thus, for example, in relation to paragraph (b)(1)(i), State competency standards will be considered presumptively sufficient if they require five years of postconviction experience, rather than three; uniform

satisfaction of the five-year/three-year experience requirement rather than allowing some exception as in 18 U.S.C. 3599(d); or training requirements for appointment in addition to the specified experience requirement.

The rule does not require that all counsel in a State qualify under the same standard. Alternative standards may be used so long as the State mechanism requires that all counsel satisfy some standard qualifying under paragraph (b). *Cf.* 18 U.S.C. 3599(d) (allowing exceptions to categorical experience requirement); *Spears*, 283 F.3d at 1013 (finding that alternative standards are allowed under chapter 154). Hence, for example, a State system may pass muster by requiring that appointed counsel either satisfy an experience standard sufficient under paragraph (b)(1)(i) or satisfy an alternative standard sufficient under paragraph (b)(2) involving more limited experience but an additional training requirement.

Option 1: § 26.22(b)(1)(i)—The Competency Standards for Federal Court Proceedings

As provided in paragraph (b)(1)(i) of § 26.22, a State may satisfy chapter 154’s requirement relating to counsel competency by requiring appointment of counsel “who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience.” This is based on the standard for appointed counsel in capital case proceedings in Federal court. *See* 18 U.S.C. 3599(a)–(e). Because Congress has determined that a counsel competency standard of this nature is adequate for capital cases in Federal court proceedings, including postconviction proceedings, *see* 18 U.S.C. 3599(a)(2), it will also presumptively be considered adequate for chapter 154 purposes when such cases are at the stage of State postconviction review.

The counsel competency standards for Federal court proceedings in capital cases under 18 U.S.C. 3599 do not require adherence to a five-year/three-year experience requirement in all

cases, but provide that the court, “for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant,” with due consideration of the seriousness of the penalty (i.e., capital punishment) and the nature of the litigation. 18 U.S.C. 3599(d). For example, a court might consider it appropriate to appoint an attorney who is a law professor with expertise in capital punishment law and training in capital postconviction litigation to represent a prisoner under sentence of death, even if the attorney has less than three years of relevant litigation experience. The rule in paragraph (b)(1)(i) accordingly does not require the imposition of a five-year/three-year minimum experience requirement in all cases, but allows States that generally impose such a requirement to permit the appointment of other counsel who would qualify for appointment under the exception allowed in 18 U.S.C. 3599, i.e., appointment by a court, for good cause, of attorneys whose background, knowledge, or experience would otherwise enable them to properly represent prisoners under sentence of death considering the seriousness of the penalty and the nature of the litigation. This recognizes, as in section 3599, that courts may properly be allowed, for good cause, to depart from the specified experience requirement, which the Department expects would occur only in exceptional cases.

Option 2: § 26.22(b)(1)(ii)—The Innocence Protection Act Standards

Paragraph (b)(1)(ii) in § 26.22 sets forth a second approach that presumptively satisfies the counsel competency requirements of chapter 154, specifically, by setting qualification standards for appointment of postconviction capital counsel in a manner consistent with the IPA. The IPA directs the Attorney General to provide grants to States to create or improve “effective system[s] for providing competent legal representation” in capital cases, 42 U.S.C. 14163(c)(1), and provides a definition of “effective system” in 42 U.S.C. 14163(e) that is largely based on

elements of the ABA Guidelines. *Compare* 42 U.S.C. 14163(e), *with* ABA Guidelines § 3.1, at 22–23. The IPA specifies that such effective systems are to include appointment of capital counsel (i) by a public defender program, (ii) by an entity composed of individuals with demonstrated knowledge and expertise in capital cases (other than current prosecutors) that is established by statute or by the highest State court with criminal case jurisdiction, or (iii) by the court appointing qualified attorneys from a roster maintained by a State or regional selection committee or similar entity pursuant to a pre-existing statutory procedure. 42 U.S.C. 14163(e)(1).

Under the IPA requirements, the appointing authority or an appropriate designated entity must “establish qualifications for attorneys who may be appointed to represent indigents in capital cases,” “maintain a roster of qualified attorneys,” “conduct, sponsor, or approve specialized training programs,” and monitor and disqualify from subsequent appointment attorneys whose performance is ineffective or unethical or who fail to participate in required training. 42 U.S.C. 14163(e)(2)(A), (B), (D), (E). The IPA does not prescribe the content of the required counsel qualification standards, but assumes that the specifications regarding the nature of the appointment or selection authority—and the associated requirements for post-appointment monitoring and potential disqualification—can be relied on to provide appropriate competency standards.

Paragraph (b)(1)(ii) in § 26.22 follows this legislative judgment in relation to a State’s satisfaction of the counsel competency requirements of chapter 154. Thus, a State’s capital counsel mechanism will presumptively be deemed adequate for purposes of chapter 154’s counsel competency requirements if it provides for the appointment and qualification (or

disqualification) of counsel in State postconviction proceedings in capital cases in a manner consistent with 42 U.S.C. 14163(e)(1) and 14163(e)(2)(A), (B), (D), (E).

Option 3: § 26.22(b)(2)—Other Standards Reasonably Assuring Proficiency

In enacting chapter 154, “Congress did not envision any specific competency standards but, rather, intended the states to have substantial discretion to determine the substance of the competency standards.” *Spears*, 283 F.3d at 1013. The options described in paragraphs (b)(1)(i) and (ii) in § 26.22 accordingly do not exhaust the means by which States may satisfy chapter 154’s requirements concerning counsel competency. Indeed, Congress in formulating chapter 154 rejected a recommendation that States uniformly be required to satisfy standards similar to those for Federal court proceedings in capital cases that currently appear in 18 U.S.C. 3599, *see* 73 FR at 75331, and in amending chapter 154 in 2006 Congress did not modify chapter 154 to require adherence by States to the IPA standards that had been enacted in 2004 but rather continued to use the more general language of chapter 154 relating to counsel competency.

Consequently, as provided in paragraph (b)(2) in § 26.22, the Attorney General will consider whether a State’s counsel competency standards reasonably assure appointment of counsel with a level of proficiency appropriate for State postconviction litigation in capital cases, even if they do not meet the particular criteria set forth in paragraph (b)(1)(i) or (b)(1)(ii). As in the courts’ consideration of the adequacy of State competency standards prior to the 2006 amendments to chapter 154, no definite formula can be prescribed for this review, and the Attorney General will assess such State mechanisms individually. Measures that will be deemed relevant include standards of experience, knowledge, skills, training, education, or combinations of these considerations that a State requires attorneys to meet in order to be eligible for appointment in State capital postconviction proceedings. *Cf.* 18 U.S.C. 3599(d) (allowing

appointment of counsel whose background, knowledge, or experience would otherwise enable such counsel to properly represent the petitioner); *Spears*, 283 F.3d at 1012–13 (finding that competency standards involving combination of experience, proficiency, and education were adequate under chapter 154); ABA Guidelines § 5.1(B)(2), at 35, § 8.1(B), at 46 (recommending skill and training requirements for capital counsel).

Also, the rule in subparagraphs (b)(1)(i) and (ii) of § 26.22 identifies particular approaches that will be considered presumptively adequate, namely, those of the Federal capital counsel statute, 18 U.S.C. 3599, or the IPA, 42 U.S.C. 14163(e)(1), (2)(A) (B), (D), (E). These approaches accordingly serve as benchmarks, and a State’s adoption of competency requirements that are likely to result in similar or even higher levels of proficiency will weigh in favor of a finding of adequacy for purposes of chapter 154. Conversely, State competency standards that appear likely to result in significantly lower levels of proficiency compared to the benchmark levels risk being found inadequate under chapter 154.

Paragraph (c) of § 26.22—Compensation of Counsel

Paragraph (c) of § 26.22 explains how a State may satisfy the requirement that it have established a mechanism for the compensation of appointed counsel. 28 U.S.C. 2265(a)(1)(A). The corresponding portion of the 2008 regulations assumed that levels of compensation for purposes of chapter 154 were a matter of State discretion, not subject to review by the Attorney General, because the statute refers simply to “compensation” and imposes no further requirement that the authorized compensation be “adequate” or “reasonable.” *See* 73 FR at 75331–32. However, the broader statutory context is the requirement that the State establish a mechanism “for the appointment [and] compensation . . . of competent counsel.” 28 U.S.C. 2265(a)(1)(A). This requirement reflects a determination by Congress that reliance on unpaid volunteers to

represent indigent prisoners under sentence of death is insufficient, and a State mechanism affording inadequate compensation could similarly fall short in ensuring the availability of competent counsel for appointment. Hence, when a State relies on a compensation incentive to secure competent counsel, chapter 154 is reasonably construed to permit the Attorney General to review the adequacy of authorized compensation. This understanding is adopted in § 26.22(c) of the proposed rule.

Paragraph (c)(1) in § 26.22 describes a number of possible compensation standards that will presumptively be considered adequate for purposes of chapter 154, generally using as benchmarks the authorizations for compensation of capital counsel that have been deemed adequate in other acts of Congress.

The first option, appearing in paragraph (c)(1)(i), is compensation comparable to that authorized by Congress for representation in Federal habeas corpus proceedings reviewing State capital cases in 18 U.S.C. 3599(g)(1). This level of compensation should similarly be adequate to ensure the availability of competent counsel for appointment in such cases at the stage of State postconviction review.

The second option, appearing in paragraph (c)(1)(ii), is compensation comparable to that of retained counsel who meet competency standards sufficient under paragraph (b). The IPA and the ABA Guidelines similarly endorse reliance on market rates for legal representation to provide adequate compensation for appointed capital counsel. *See* 42 U.S.C. 14163(e)(2)(F)(ii)(II); ABA Guidelines § 9.1(B)(3), at 49. Compensation sufficient to induce competent attorneys to carry out such representation for hire should likewise be sufficient to attract competent attorneys to accept appointments for such representation.

The third option, appearing in paragraph (c)(1)(iii), is compensation comparable to that of appointed counsel in State appellate or trial proceedings in capital cases. *Cf.* 18 U.S.C. 3599(g)(1) (authorization for compensation of capital counsel not differentiating between compensation at different stages of representation). The compensation afforded at the stages of trial and appeal must be sufficient to secure competent attorneys to provide representation because effective legal representation is constitutionally required at those stages. Comparable compensation should accordingly be sufficient for that purpose at the postconviction stage.

The fourth option, appearing in paragraph (c)(1)(iv), is compensation comparable to that of attorneys representing the State in State postconviction proceedings in capital cases. This option also follows the IPA and the ABA Guidelines, which provide that capital counsel employed by defender organizations should be compensated on a salary scale commensurate with the salary scale of prosecutors in the jurisdiction. 42 U.S.C. 14163(e)(2)(F)(ii)(I); ABA Guidelines § 9.1(B)(2), at 49. The rule allows this approach for compensation of both public defenders and private counsel, but recognizes that private defense counsel may have to pay from their own pockets overhead expenses that publicly employed prosecutors do not bear. The rule accordingly specifies that, if paragraph (c)(1)(iv) is relied on to justify the level of compensation authorized for private counsel, the compensation standard should take account of overhead costs (if any) that are not otherwise payable as reasonable litigation expenses. *Cf. Baker*, 220 F.3d at 285–86 (finding that compensation resulting in substantial losses to appointed counsel was inadequate under chapter 154).

In comparing a State’s compensation standards to the benchmarks identified in paragraph (c)(1), both hourly rates and overall limits on compensation will be taken into account. For example, under paragraph (c)(1)(iii), suppose that State law authorizes the same hourly rate for

compensation of appointed capital counsel at the appellate stage and in postconviction proceedings, but it specially imposes a low overall limit on compensable hours at the postconviction stage. The compensation authorized at the respective stages may then not be comparable in any realistic sense, and the objective of ensuring the availability of competent counsel for postconviction representation may not be realized, because counsel who accepted such representation would effectively be required to function as uncompensated volunteers to the extent they needed to work beyond the maximum number of compensable hours. This does not mean that State compensation provisions will be deemed inadequate if they specially prescribe presumptive limits on overall compensation at the postconviction stage, but comparability to the paragraph (c)(1) benchmarks may then depend on whether the State provides means for authorizing compensation beyond the presumptive maximum where necessary. *Cf. Spears*, 283 F.3d at 1015 (approving a presumptive 200-hour limit under chapter 154 where compensation was available for work beyond that limit if reasonable); *Mata v. Johnson*, 99 F.3d 1261, 1266 (5th Cir. 1996) (overall \$7500 limit on compensation was not facially inadequate under chapter 154 and was not shown inadequate in the particular case), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997).

As with the counsel competency benchmarks of paragraph (b)(1), the counsel compensation standards of paragraph (c)(1) provide only a floor that States are free to exceed, and not all counsel must be compensated in conformity with a single standard. A State may adopt alternative standards, each comparable to or exceeding some benchmark identified in paragraph (c)(1), and provide for compensation of different counsel or classes of counsel in conformity with different standards. For example, a State might provide for representation of some indigent capital petitioners in postconviction proceedings by appointed private counsel and

some by public defender personnel, compensate the private counsel in conformity with paragraph (c)(1)(iii), and compensate the public defender counsel in conformity with paragraph (c)(1)(iv).

The rule recognizes that the options set out in paragraph (c)(1) of § 26.22 are not necessarily the only means by which a State may provide compensation for competent counsel. State compensation provisions for capital counsel have been deemed adequate for purposes of chapter 154 and other Federal laws independent of any comparison to the benchmarks in paragraph (c)(1). *See* 42 U.S.C. 14163(e)(2)(F)(i) (under the IPA, State may compensate under qualifying statutory procedure predating that Act); *Spears*, 283 F.3d at 1015 (State could compensate at “a rate of up to \$100 an hour, a rate that neither Petitioner nor amici argue was unreasonable”). Also, a State may secure representation for indigent capital petitioners in postconviction proceedings by means not dependent on any special financial incentive for accepting appointments, such as by providing sufficient salaried public defender personnel to competently carry out such assignments as part of their duties. Accordingly, under paragraph (c)(2) in § 26.22, capital counsel mechanisms involving compensation provisions that do not satisfy paragraph (c)(1) may be found to satisfy the statutory requirement if they are otherwise reasonably designed to ensure the availability of competent counsel. As with § 26.22(b)(2) of the rule, mechanisms seeking to qualify under paragraph (c)(2) that appear likely to provide for significantly lesser compensation compared to the benchmark levels risk being found inadequate under chapter 154.

Paragraph (d) of § 26.22—Payment of Reasonable Litigation Expenses

Paragraph (d) of § 26.22 incorporates the requirement in 28 U.S.C. 2265(a)(1)(A) to provide for the payment of reasonable litigation expenses. An inflexible cap on reimbursable

litigation expenses in capital postconviction proceedings could contravene this requirement by foreclosing the payment of costs incurred by counsel, even if determined by the court to be reasonably necessary. However, the requirement does not foreclose a presumptive limit if the State provides means for authorizing payment of litigation expenses beyond the limit where necessary. *Cf.* 18 U.S.C. 3599(f), (g)(2) (establishing presumptive \$7500 limit on payment for litigation expenses in Federal court proceedings in capital cases, with authority for chief judge or delegate to approve higher amounts); *Mata*, 99 F.3d at 1266 (concluding that overall \$2500 limit on payment of litigation expenses was not facially inadequate under chapter 154 and was not shown to be inadequate in the particular case).

Section 26.23

Section 26.23 in the rule sets out the mechanics of the certification process for States seeking to opt in to chapter 154.

Paragraph (a) provides that an appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for chapter 154 certification. Paragraph (b) provides that the Attorney General will make the request available on the Internet and solicit public comment on the request by publishing a notice in the *Federal Register*. It requires Internet availability because State requests for certification may include supporting materials not readily reproducible or viewable in the *Federal Register*, such as copies of State statutes, rules, and judicial decisions bearing on the State's satisfaction of chapter 154's requirements for certification.

As provided in paragraph (c), the Attorney General will review the State's request, including consideration of timely public comments received in response to a *Federal Register* notice. The Attorney General will decide whether the State has satisfied the requirements for

chapter 154 certification and will publish the certification in the *Federal Register* if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established, as that date is the effective date of the certification. 28 U.S.C. 2265(a)(2).

Paragraph (d) addresses the effect of changes or alleged changes in a State’s capital counsel mechanism after that mechanism has been certified by the Attorney General. The paragraph first addresses situations involving changes or alleged changes in a State’s capital counsel mechanism prior to State postconviction proceedings in a capital case. Chapter 154’s special Federal habeas corpus review procedures apply in cases in which two conditions are met: (i) the State’s capital counsel mechanism has been certified by the Attorney General, 28 U.S.C. 2261(b)(1), and (ii) “counsel was appointed pursuant to that mechanism”—i.e., the mechanism certified by the Attorney General—unless the petitioner “validly waived counsel . . . [or] retained counsel . . . or . . . was found not to be indigent,” 28 U.S.C. 2261(b)(2). The first sentence of paragraph (d) therefore notes that certification by the Attorney General under chapter 154 reflects the Attorney General’s determination that the State capital counsel mechanism examined in the Attorney General’s review satisfies chapter 154’s requirements. If a State later discontinues that mechanism before counsel is appointed in a given State postconviction proceeding, then counsel in that case will not have been “appointed pursuant to” the mechanism that was approved by the Attorney General and chapter 154 would accordingly be inapplicable in that case. Similarly, if a State later changes or is alleged to have changed the certified mechanism, litigation before Federal habeas courts may result under 28 U.S.C. 2261(b)(2) as to whether the State has in fact materially changed its mechanism and, if so, whether the change

means that counsel (even if appointed) was appointed pursuant to what is effectively a new and uncertified mechanism, rather than the mechanism certified by the Attorney General.

The second sentence of paragraph (d) accordingly provides that a State may seek a new certification by the Attorney General if there is a change or alleged change in a previously certified capital counsel mechanism. If a State wishes to improve on a certified capital counsel mechanism, then certification by the Attorney General of the new or revised mechanism will allow the State to avoid Federal habeas court litigation over whether chapter 154 is applicable to cases involving appointments made pursuant to that mechanism. Similarly, if legal questions are raised about the continued applicability of chapter 154 based on changes or alleged changes in a certified capital counsel mechanism, a State may seek a new certification by the Attorney General that its current mechanism satisfies chapter 154's requirements, ensuring the continued applicability of chapter 154's special Federal habeas corpus procedures. By seeking a new certification of a new or revised capital counsel mechanism, a State may ensure that it is the Attorney General, subject to review by the D.C. Circuit Court of Appeals, who determines whether its capital counsel mechanism is in present compliance with chapter 154's requirements, *see* 28 U.S.C. 2261(b)(1), 2265(c)(2), and avoid litigation over that matter in the Federal habeas courts.

The final sentence in paragraph (d) states that subsequent changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in cases in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case. For example, suppose that the Attorney General certifies a State's capital counsel mechanism in 2013, the State postconviction proceedings in a capital case are carried out in 2014 and 2015 with counsel in those proceedings appointed pursuant to the certified mechanism, and

Federal habeas corpus proceedings in the case commence in 2016. Suppose further that the State makes some change in 2016 to its counsel competency or compensation standards. Because a certified capital counsel mechanism would have been in place throughout State postconviction review, the prerequisites for expedited Federal habeas corpus review under chapter 154 would be satisfied. *See* 28 U.S.C. 2261(b). That result would not be affected by later changes in the State's postconviction capital counsel mechanism.

Section 26.23(e) provides in part that a chapter 154 certification remains effective for a period of five years. This takes account of the possibility of changes over time in a State's standards constituting its postconviction capital counsel mechanism, and the possibility of other changes in a State that may affect the continuing sufficiency over time of standards initially adopted by a State and certified under chapter 154. For example, a State provision authorizing compensation of counsel at a specified hourly rate may initially be reasonably designed to ensure the availability for appointment of competent counsel, but that may no longer be the case after the passage of years in light of inflation or other changed economic circumstances. *Cf. Durable Mfg. Co.*, 578 F.3d at 501–02 (upholding time limitation of validity of labor certificates in light of possible subsequent changes in economic circumstances affecting consistency with statutory requirements and objectives). Providing for some limitation on the lifespan of certifications and requiring renewal allows questions concerning the continued adequacy of the mechanism's standards, including whether they continue to apply, to be reexamined at regular intervals, each time with increased information about a State's actual experience with its mechanism, rather than assuming that a once-compliant State system is compliant indefinitely. At the same time, overly stringent limits on the duration of certifications could unduly burden States and undermine the

incentive States have under chapter 154 to undertake the effort to establish compliant mechanisms and seek their certification.

Balancing these considerations, § 26.23(e) in the rule provides a basic period of five years during which a certification remains valid, with further provisions regarding the beginning and end of the period to promote the uninterrupted availability of the benefits of chapter 154 to a certified State when seeking recertification. As provided in 28 U.S.C. 2265(a)(2), the effectiveness of a certification is backdated to the date the certified capital counsel mechanism was established, but under the rule the five-year limit on its duration does not begin to run until the completion of the certification process by the Attorney General and any related judicial review. Moreover, the rule provides that a certification remains effective for an additional period extending until the conclusion of the Attorney General's disposition of the State's recertification request and any judicial review thereof, if the State requests recertification at or before the end of the five-year period.

Regulatory Certifications

Executive Order 13563 and 12866

As described in Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011), agencies must, to the extent permitted by law, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss

qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Department of Justice has determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f), and, accordingly, this rule has been reviewed by the Office of Management and Budget. The determination that this is a significant regulatory action, however, does not reflect a conclusion that it is “likely to result in a rule that may . . . [h]ave an annual effect on the economy of \$100 million or more” or other effects as described in section 3(f)(1) of the Executive Order.

This rule has no effect on States unless they decide that they wish to qualify for chapter 154 certification. If States do decide to apply for chapter 154 certification, the resulting costs will mainly depend on (i) the number of capital cases these States litigate in State postconviction proceedings, and (ii) the incremental difference (if any) between their current per-case capital litigation costs and the corresponding costs under a system that complies with this rule.

These costs cannot be exactly quantified because (i) we do not know how many States will try to seek certification based on their own analysis of whether it is beneficial on balance to do so; (ii) the rule provides States wide latitude to design their own appointment mechanism; (iii) the rule affords the Attorney General discretion in making certification decisions; and (iv) there are non-quantifiable benefits to providing an opt-in system that may outweigh the costs such as improved fairness and equity in capital counsel systems. Absent a State’s application and public comment, the Department cannot determine whether the Attorney General would decide, in his discretion, to certify that the State’s capital counsel mechanism satisfies this rule.

Moreover, even if the Department could determine at this time that a State’s mechanism fails to meet this rule’s standards, the Department does not have the data necessary to calculate

the costs of making the State mechanism compliant and the rule gives States substantial discretion to correct any perceived shortfall in a myriad of ways. Thus, any cost projections would need to be specific to each State and would depend on unknown variables such as how a State will design compensation and competency standards and whether and how the Attorney General will exercise discretion. Against this background, the Department cannot quantify the costs and benefits of this rule.

Despite the impracticability of exact quantification, the Department can confidently project that the annual cost will not exceed \$100 million. At the end of 2010, 36 States held 3,100 prisoners under sentence of death. *See* Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, *Capital Punishment, 2010—Statistical Tables* at 8, table 4 (Dec. 2011), *available at* <http://www.bjs.gov/content/pub/pdf/cp10st.pdf>. Regarding the costs of satisfying the requirements of this rule, 35 of the 36 States accounting for capital cases in the United States already provide for appointment of counsel in State postconviction proceedings. These States may still fall short of satisfying this rule's standards, in relation to such matters as payment of litigation expenses or compensation of counsel, but this rule affords States a variety of options that may minimize any resulting increase in costs.

Assuming that all 36 States that currently have the death penalty will upgrade their postconviction capital counsel mechanisms to the extent necessary to satisfy this rule, and that the number of capital cases pending in State postconviction proceedings in a year is 2,000, the total cost for the States to comply with this rule could not reach \$100 million unless the average increase in litigation costs were \$50,000 for each case. While for the reasons explained above we have not estimated the costs for States to satisfy this rule, we have no reason to believe that costs would increase to that degree.

States that obtain certification by the Attorney General under this rule could realize costs savings resulting from chapter 154's expedited procedures in subsequent Federal habeas corpus review. *See* 28 U.S.C. 2262, 2264, 2266. Chapter 154's expedited procedures offer States the benefits of: (i) definite rules regarding the commencement and expiration of stays of execution, *see* 28 U.S.C. 2262; (ii) clearer and more circumscribed rules regarding the claims cognizable on federal habeas corpus review, *see* 28 U.S.C. 2264; (iii) general times frames of 450 days and 120 days respectively for decision of capital habeas petitions by federal district courts and courts of appeals, *see* 28 U.S.C. 2266(b)(1); and (iv) limited allowances for the amendment of such petitions, *see* 28 U.S.C. 2266(b)(3). In addition, because the States would more fully defray the costs of representing indigent capital petitioners in State postconviction proceedings, there would be less need for representation by private counsel on a pro bono basis, often arranged through postconviction capital defense projects. Thus, State costs also would be offset by reduced costs for private entities and individuals who otherwise would provide representation, reducing the overall economic effect.

Along with the cost savings States could obtain, this rule also affords indigent capital petitioners non-quantifiable benefits. If a State chooses to “opt-in” to Chapter 154, an indigent capital petitioner is more likely to be represented by competent counsel in state postconviction proceedings—proceedings in which there is no constitutional right to counsel. The timely appointment of qualified counsel also provides indigent capital petitioners the opportunity to properly and promptly present their challenges in postconviction proceedings without the severe time pressure created by the belated entry of a lawyer. Above all, the rule's requirement of timely appointment of competent counsel seeks to provide an indigent capital petitioner the

benefit of a collateral review that will be fair, thorough, and the product of capable and committed advocacy.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. It provides only a framework for those States that wish to qualify for the benefits of the expedited habeas procedures of chapter 154 of title 28 of the United States Code. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule provides only a framework for those States that wish to qualify for the benefits of the expedited habeas procedures of chapter 154 of title 28 of the United States Code.

Unfunded Mandates Reform Act of 1995

This rule will not result in aggregate expenditures by State, local and tribal governments or by the private sector of \$100,000,000 or more in any one year, and it will not significantly or

uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects in 28 CFR Part 26

Law enforcement officers, Prisoners.

Accordingly, for the reasons set forth in the preamble, part 26 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 26—DEATH SENTENCES PROCEDURES

1. The authority citation for part 26 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 4001(b), 4002; 28 U.S.C. 509, 510, 2261, 2265.

2. A new Subpart B is added to Part 26 to read as follows:

Subpart B--Certification Process for State Capital Counsel Systems

Sec.

26.20 Purpose.

26.21 Definitions.

26.22 Requirements.

26.23 Certification process.

Subpart B--Certification Process for State Capital Counsel Systems

§ 26.20 Purpose.

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If the Attorney General certifies that a State has established such a mechanism, sections 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to Federal habeas corpus review of State capital cases in which counsel was appointed pursuant to that mechanism. These sections will also apply in Federal habeas corpus review of capital cases from a State with a mechanism certified by the Attorney General in which petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent, as provided in section 2261(b) of title 28. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

§ 26.21 Definitions.

For purposes of this part, the term—

Appointment means provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.

Appropriate State official means the State attorney general, except that, in a State in which the State attorney general does not have responsibility for Federal habeas corpus litigation, it means the chief executive of the State.

Indigent prisoners means persons whose net financial resources and income are insufficient to obtain qualified counsel.

State postconviction proceedings means collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review.

§ 26.22 Requirements.

The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:

(a) As provided in 28 U.S.C. 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation, and the mechanism must provide for the entry of an order by a court of record—

(1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

(b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.

(1) A State's standards of competency are presumptively adequate if they meet or exceed either of the following criteria:

(i) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation; or

(ii) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. 14163(e)(2)(B), (D), and (E) are also satisfied.

(2) Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

(c) The mechanism must provide for compensation of appointed counsel.

(1) A State's provision for compensation is presumptively adequate if the authorized compensation is comparable to or exceeds—

(i) The compensation of counsel appointed pursuant to 18 U.S.C. 3599 in Federal habeas corpus proceedings reviewing capital cases from the State;

(ii) The compensation of retained counsel in State postconviction proceedings in capital cases who meet State standards of competency sufficient under paragraph (b);

(iii) The compensation of appointed counsel in State appellate or trial proceedings in capital cases; or

(iv) The compensation of attorneys representing the State in State postconviction proceedings in capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses.

(2) Provisions for compensation not satisfying the benchmark criteria in paragraph (c)(1) of this section will be deemed adequate only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency sufficient under paragraph (b) of this section.

(d) The mechanism must provide for payment of reasonable litigation expenses of appointed counsel. Such expenses may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel. Provision for reasonable litigation expenses may incorporate presumptive limits on payment only if means are authorized for payment of necessary expenses above such limits.

§ 26.23 Certification process.

(a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart.

(b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the *Federal Register*—

(1) Indicating that the State has requested certification;

(2) Identifying the Internet address at which the public may view the State's request for certification; and

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the *Federal Register* notice under paragraph (b) of this section, or any subsequent notice the Attorney General may

publish providing a further opportunity for comment. The certification will be published in the *Federal Register* if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.

(e) A certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review. If a State requests re-certification at or before the end of that five-year period, the certification remains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

Dated: September 11, 2013.

Eric H. Holder, Jr.
Attorney General

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